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Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

HYNIX SEMICONDUCTOR, INC. AND HYNIX SEMICONDUCTOR AMERICA, INC.,

Petitioners,

v.

RAMBUS INC.,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of the Federal Arbitration Act's strong federal policy favoring arbitration, a generic choice-of-law clause in a contract providing for arbitration incorporates state arbitration rules that limit or prevent arbitration.

LIST OF PARTIES AND CORPORATE DISCLOSURE

The petitioners are Hynix Semiconductor, Inc. and Hynix Semiconductor America, Inc. Hynix Semiconductor, Inc. has no parent corporation, and no single publicly held company owns 10% or more of its stock. Hynix Semiconductor America, Inc., is a subsidiary of Hynix Semiconductor, Inc. Hynix Semiconductor, Inc. owns more than 10% of Hynix Semiconductor America, Inc.'s stock.

Respondent is Rambus Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California.

DECISIONS BELOW

The order of the California Supreme Court denying review is unreported and is reprinted in the Appendix ("App.") hereto at 1a. The opinion of the Court of Appeal of the State of California, First Appellate District, Division Two is unpublished and is reprinted at App. 2a. The opinion of the Superior Court of the State of California, County of San Francisco is unpublished and is reprinted at App. 37a.

JURISDICTION

The order of the California Supreme Court denying review was issued on March 21, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The relevant portion of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The relevant portion of the California statute at issue, California Code of Civil Procedure Section 1281.2, is set forth at App. 42a.

INTRODUCTION

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-15, was enacted to "overrule the judiciary's long-standing refusal to enforce agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985). It establishes an "emphatic federal policy in favor of arbitra[tion]," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), and requires all courts to construe arbitration agreements with a strong presumption in favor of arbitration, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

The federal circuits and state supreme courts are directly and broadly divided over the effect of the FAA on generic choice-of-law clauses that select the law of states whose rules limit or prevent arbitration. This common issue arises because commercial contracts routinely include two kinds of clauses: arbitration clauses, which provide that all disputes under the contract are to be arbitrated; and generic choice-of-law clauses, which provide in broad terms that a particular state's law will govern interpretation of the contract, but say nothing specific about whether that choice of law also applies to arbitration procedures. Seven circuits and the courts of at least five states have held that, in light of the FAA, such generic choice-of-law clauses determine *only* the substantive law that will govern contractual disputes. In direct conflict with these decisions, two circuits and the courts of at least four states—including the court below—have held that generic choice-of-law clauses *also* incorporate state arbitration rules, even when those rules limit or prevent arbitration.

This broad division of authority arises directly from and mirrors an apparent conflict between two of this Court's own decisions. In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989), this Court affirmed the California Court of Appeal's conclusion that a generic choice-of-law clause in a contract was intended to choose California arbitration rules,

including a procedure under which arbitration was stayed pending trial. Six years later, in *Mastrobuono v. Shearson Leahman Hutton, Inc.*, 514 U.S. 52 (1995), this Court cast serious doubt on that holding, ruling that a generic New York choice-of-law clause could *not* be interpreted to require application of a New York arbitration rule that significantly narrowed the scope of an arbitration.

This conflict should be resolved now. As the Second Circuit has noted, the question of how generic choice-of-law clauses affect the rules of arbitration has become "a recurring and troubling theme in many commercial contracts." *Security Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 323 (2d Cir. 2004). The split in authority on this question is widely recognized, *see, e.g.*, *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001) (noting the "circuit-split[]" on "the conceptually complex issue of how courts should determine whether parties have contracted out of the FAA's default rules"), and one federal judge has explicitly called on this Court to resolve it, *see id.* (Ambro, J., concurring) ("I would suggest [] that in light of the Circuit split on this issue, the Supreme Court may wish to clarify its holding in *Mastrobuono*."). Because the conflict is rooted in the tension between this Court's decisions in *Mastrobuono* and *Volt*, it is almost certain to persist unless and until this Court intervenes.

The conflict, moreover, has harmful practical effects. As the law stands, the same choice-of-law provision can have a very different effect depending on the jurisdiction in which it is reviewed: it can either serve to select only the substantive law that will govern interpretation of a contract, or it can determine as well that state arbitration rules will govern a dispute, sharply limiting the scope of the arbitration or preventing it from taking place at all. This lack of uniformity, and the forum-shopping it encourages, are directly contrary to the purposes of the FAA. Furthermore, in those jurisdictions that invoke *Volt* and interpret generic choice-of-law clauses

to incorporate arbitration-limiting state rules, the FAA's pro-arbitration policies are being frustrated, and disputes that parties agreed to arbitrate are instead being subjected to the costly and time-consuming process of full-blown civil litigation. This Court should thus grant review, in order to ensure that the FAA is being uniformly and correctly applied in all jurisdictions, and to clarify when, if at all, *Volt* continues to apply after *Mastrobuono*.

STATEMENT OF THE CASE

A. Factual Background

Petitioners Hynix Semiconductor, Inc. and Hynix Semiconductor America, Inc. (collectively "Hynix") manufacture and sell computer memory chips known as dynamic random access memory ("DRAM") chips. Samsung Electronics Co., Ltd., Samsung Semiconductor, Inv., and Samsung Electronics America, Inc. (collectively "Samsung") also make DRAM chips. Respondent Rambus Inc. ("Rambus") designs and develops its own proprietary type of DRAM known as Rambus-DRAM, or "RDRAM." Rambus has entered into various licensing agreements with Hynix and Samsung for the manufacture, marketing, and sales of RDRAM. Rambus has also entered into a licensing agreement with Micron Technology, Inc., and Micron Semiconductor Products, Inc. (collectively "Micron"), another chip manufacturer.

This case concerns a 1994 licensing agreement between Rambus and Hynix. The agreement grants Hynix a worldwide, nonexclusive license to develop, manufacture, market, and sell RDRAM. The Agreement includes both a choice-of-law clause and an arbitration clause that requires the parties to resolve any dispute between them through binding arbitration. The choice-of-law clause provides:

> 9.1 *Governing Law.* This Agreement shall be governed by and interpreted in accordance with the laws of the State of California, U.S.A., without reference to conflict of laws principles.

The arbitration clause provides:

> 9.2 *Arbitration.* All disputes between [Hynix] and Rambus arising out of or in connection with this Agreement shall be settled amicably through negotiations. In case such dispute or difference cannot be settled by such means, it shall be finally settled by binding arbitration in English. If action is initiated by [Hynix], such arbitration shall take place in San Francisco, California under the Commercial Rules of Arbitration of the American Arbitration Association by one arbitrator appointed in accordance with such rules. If action is initiated by Rambus, such arbitration shall take place in Seoul, Korea pursuant to the U.S.-Korean Commercial Arbitration Agreement of December 1, 1974 by which each party is bound. The arbitrator shall apply California law to the merits of any dispute or claim, without reference to rules of conflicts of law or arbitration. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, the partes may apply to any court of competent jurisdiction for injunctive relief without breach of this arbitration provision.

Samsung has a similar arbitration clause in its agreement with Rambus. Micron does not.

B. Proceedings Below

1. In May 2004, Rambus filed antitrust and other claims against Hynix, Samsung, and Micron in the Superior Court of the State of California, San Francisco County. Hynix and Samsung both filed motions to compel arbitration, based on the arbitration clauses in their agreements with Rambus. On August 30, 2005, the Superior Court denied Hynix's motion. The trial court acknowledged that the arbitration clause in Hynix's agreement was valid and enforceable, and covered Rambus' claims. App. 38a. However, the court asserted that because the choice-of-law and arbitration clauses in the

agreement provided that California law would apply to the merits of any dispute or claim under the contract, and because no language in the agreement indicated that California arbitration rules would *not* apply, "[t]he California rules of arbitration, including Section 1281.2(c) of the California Code of Civil Procedure, apply to this case." App. 39a. The court then observed that, under Section 1281.2(c)—a provision applicable when a party to an arbitration agreement is also party to a court action involving a third party—it had the discretion to refuse to enforce an arbitration clause if arbitration would produce a "substantial risk of inconsistent results and undue duplication of efforts." *Id.* Citing the pending action involving Micron and Samsung, the court denied the motions to compel arbitration. App. 39a-40a. The court also candidly acknowledged that, if California arbitration rules had not applied, it "would not have [had] discretion to deny arbitration." App. 39a. On October 31, 2005, the court denied Samsung's petition to compel arbitration, for essentially identical reasons. App. 3a.

2. Hynix and Samsung appealed, and the Court of Appeal, First Appellate District, affirmed. The court first determined that it would interpret Hynix's and Samsung's agreements as requiring application of the California rules of arbitration, rather than the FAA. The court acknowledged that the FAA had been "enacted in 1925 to 'overrule the judiciary's longstanding refusal to enforce agreements to arbitrate.'" App. 9a (quoting *Dean Witter*, 470 U.S. at 219-20). The court further acknowledged that because the FAA did "not contain a provision similar to section 1281.2[c]," it required "an arbitration agreement to be enforced even if multiple parties are involved who are not bound to arbitrate." App. 9a. However, the court viewed its analysis as controlled by *Cronus Investments, Inc. v. Concierge Services*, 107 P.3d 217 (Cal. 2005). In that case, the California Supreme Court had held that Section 1281.2(c) was not preempted by the FAA, and that it applied "to any arbitration

agreement that includes a broad California choice-of-law provision unless the parties to an arbitration agreement '*expressly* designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law.'" App. 10a (quoting *Cronus*, 107 P.3d at 229.

Applying *Cronus*, the Court of Appeal determined that neither the choice-of-law nor the arbitration clause in Hynix's and Samsung's agreements "expressly" designated that FAA procedural rules should govern enforcement of the arbitration clause. *Id.* The "broad choice-of-law provision," the court observed, "expressly states that California law governs." App. 12a. And the arbitration provision merely directed the arbitrator "to apply California law to the merits of the dispute," *id.*, remaining "silent about the procedural rules that the court should apply in determining the availability of arbitration," App. 13a. "Nowhere in the agreement," the court concluded, "is there any provision that states federal law rather than California law should apply to the procedure of selecting arbitration." *Id.*

Having concluded that the agreements required application of California law, including Section 1281.2(c), the court further concluded that such an application was not precluded by the FAA. App. 24a-28a. The court acknowledged that section 2 of the FAA "does not authorize courts to stay or deny arbitration in circumstances involving multiple parties." App. 25a. But the court asserted that this was a "procedural provision." *Id.* Quoting *Volt*, the court explained that "[t]o force the parties to arbitrate under the FAA's procedural rules where they have not expressly agreed to do so, 'would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms.'" *Id.* *Volt*, the court continued, had held that the FAA does not preclude application of section 1281.2(c) where the parties have agreed to arbitrate in accordance with California law. *Id.* And the California Supreme Court had

held that "when the parties choose California law to govern their agreement, the procedural sections of the FAA are not 'applicable.'" *Id.* (quoting *Cronus*, 107 P.3d at 219). Here, the Court continued, because the agreements contained a "broad California choice-of-law clause and fail[ed] to designate the FAA as governing the enforcement or the interpretation of the arbitration provision," App. 23a, they effectively chose California procedure, and those procedures were not preempted by the FAA.

REASONS FOR GRANTING THE WRIT

I. FEDERAL AND STATE COURTS ARE IN CONFLICT OVER WHETHER A GENERIC CHOICE-OF-LAW CLAUSE INCORPORATES STATE RULES THAT LIMIT OR PREVENT ARBITRATION

A. Seven Circuits And Courts In Five States Have Relied On *Mastrobuono* To Hold That Generic Choice-of-Law Clauses Do Not Incorporate State Arbitration Procedures That Limit Or Prevent Arbitration

The federal and state courts are in conflict over whether, in light of the FAA, generic choice-of-law clauses incorporate state arbitration rules that limit or prevent arbitration. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), this Court held that the FAA requires all courts to resolve any doubts in the interpretation of arbitration agreements in favor of arbitration. *See id.* at 24-25 ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

Applying this presumption in *Mastrobuono*, this Court held that a generic New York choice-of-law provision did

not incorporate a New York rule prohibiting arbitrators from awarding punitive damages. The choice-of-law provision provided that the contract would be "governed by New York law." 514 U.S. at 55. The Court noted that Congress had passed the FAA to "overcome courts' refusals to enforce agreements to arbitrate." *Id.* at 55 (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995)). Acknowledging that "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties," *id.* at 57, the Court noted that the FAA also "ensures that [an] agreement will be enforced according to its terms even if a rule of state law would otherwise" prevent arbitration of claims the parties agreed to arbitrate. *Id.* at 58.

The generic New York choice-of-law clause at issue in *Mastrobuono*, the Court observed, could "be reasonably read as merely a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship." *Id.* at 59. And nothing in the contract evinced an intent to *exclude* punitive damages claims. *Id.* "At most," the Court observed, "the choice-of-law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards." *Id.* "[W]hen a court interprets such provisions in an agreement covered by the FAA," the Court concluded, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Id.*

In the wake of *Mastrobuono*, seven circuits and at least five states have held that generic choice-of-law clauses may not be interpreted to require application of state rules that hinder or thwart arbitration. In *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998), for example—a case that conflicts directly with the decision below—the Ninth Circuit held that the presence of a generic California choice-of-law provision did *not* permit a trial court to decline to enforce an arbitration agreement under Section 1281.2(c) of the Cali-

fornia Code of Civil Procedure. "*Mastrobuono*," the court explained, "dictates that general choice-of-law clauses do not incorporate state rules that govern the allocation of authority between courts and arbitrators." *Wolsey*, 144 F.3d at 1213. Noting that Section 1281.2(c) "assuredly does affect California's 'allocation of power between alternative tribunals,'" the court concluded that the choice-of-law clause did not incorporate California arbitration law. *Id.* at 1212-13; *accord Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) ("a general choice-of-law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration").

The First, Third, Fourth, Fifth, Sixth, and Eighth Circuits have likewise held that under the FAA, a generic choice-of-law clause does not incorporate state rules that limit or prevent arbitration. As these courts have recognized, generic choice-of-law clauses are generally intended to address the "horizontal" choice among different states' laws, not the "vertical" question of whether state or federal law will apply. *Roadway*, 257 F.3d at 293; *accord Mastrobuono*, 514 U.S. at 59. Under the FAA's presumption requiring courts to interpret ambiguities in arbitration agreements in favor of arbitration, such clauses cannot be construed as incorporating state rules that would limit or preclude arbitration. *See Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 29 (1st Cir. 2005) ("mere inclusion of a generic choice-of-law clause within the arbitration agreement is not sufficient to require the application of state [arbitration] law"); *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 594 (1st Cir. 1996) ("Following the principles and analysis set forth in *Mastrobuono*, we . . . find that the choice-of-law clause in this case is not an expression of intent to adopt New York caselaw" regarding arbitration); *Roadway*, 257 F.3d at 296 ("a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards"); *Porter Hayden Co. v. Century Indem. Co.*, 136

F.3d 380, 383 (4th Cir. 1998) ("absent a clearer expression of the parties' intent to invoke state arbitration law, we will presume that the parties intended federal arbitration law to govern"); *Action Indus., Inc. v. United States Fidelity & Guaranty Co.*, 358 F.3d 337, 342 (5th Cir. 2004) ("In the wake of *Mastrobuono*, . . . a choice-of-law provision is insufficient, by itself, to demonstrate the parties' clear intent to depart from the FAA's default rules."); *Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005) ("Considering the federal policy in favor of arbitration" and "interpreting the agreement's choice-of-law provision in light of . . . *Mastrobuono*, . . . [w]e do not believe that the parties intended to displace the federal standard for vacatur [of an arbitration award] when the only evidence of such intent is a generic choice-of-law provision."); *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926, 938 (6th Cir. 1998) ("we harmonize the provisions of the [contract] in the same manner as the Court in *Mastrobuono*: by ruling that the choice-of-law clause is not an 'unequivocal inclusion' of" Ohio law and that the FAA therefore applies); *UHC Mgmt. Co. v. Computer Sciences Corp.*, 148 F.3d 992, 996 (8th Cir. 1998) ("a general choice-of-law provision, standing alone, is [in]sufficient to lead to the inference that the parties intended for a state arbitration statute to apply").

Courts in at least five states, including the highest courts of Connecticut and Texas, have likewise held that, consistent with the FAA, a generic choice-of-law provision may not be construed to require application of state arbitration rules that limit or block arbitration. *See Levine v. Advest Inc.*, 714 A.2d 649 (Conn. 1998) (generic New York choice of law clause did not permit application of New York law of arbitration); *L & L Kempwood Assoc., L.P. v. Omega Builders, Inc.*, 9 S.W.3d 125, 127-28 (Tex. 1999) (Texas choice-of-law clause did not require application of Texas arbitration law, because "[t]he choice-of-law provision did not specifically exclude the application of federal law"); *Autonation*

Fin. Servs. Corp. v. Arain, 592 S.E.2d 96, 98 (Ga. Ct. App. 2003) ("[a]lthough the installment contract also states that it 'will be governed by the laws of the State of Georgia' the language of the arbitration clause makes clear the parties' intention that it is governed by the FAA"); *1745 Wazee LLC v. Castle Builders Inc.*, 89 P.3d 422, 425 (Colo. Ct. App. 2003) (concluding that a Colorado choice of law clause "relates only to the substantive law in Colorado," and not Colorado's arbitration rules); *Kamaya Co. v. Am. Prop. Consultants, Ltd.*, 959 P.2d 1140 (Wash. Ct. App. 1998) (because general Japanese choice-of-law clause did not unequivocally indicate intent to invoke Japanese arbitration law, the FAA applied).

B. Two Circuits And Courts In At Least Four States Have Invoked *Volt* To Hold That Generic Choice-of-Law Clauses Permit Courts To Apply State Arbitration Procedures That Limit Or Thwart Arbitration

In direct conflict with the foregoing federal circuit and state court decisions, two circuits and courts in at least four states—including the highest courts of two states—have invoked this Court's opinion in *Volt* to hold that a generic choice-of-law clause *does* require application of state rules that restrict or block arbitration. *Volt* itself involved a generic choice-of-law provision that provided that a contract would "be governed by the law of" California. 489 U.S. at 470. After one party petitioned the California Superior Court to compel arbitration, the other party moved to stay the arbitration under Section 1281.2(c) of the California Code of Civil Procedure. The Superior Court granted the stay, and the California Court of Appeal affirmed, holding that by specifying that their contract would be "governed by" California law, the parties had intended to incorporate the California rules of arbitration into their arbitration agreement. *Id.* at 472.

This Court also affirmed. The FAA, the Court noted, did not confer a right to compel arbitration as such, but rather a "right to obtain an order directing that arbitration proceed in the manner provided for in the parties' agreement." *Id.* at 475 (internal quotation marks and alterations omitted). The Court noted that "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Id.* at 474. But it went on to conclude that the Court of Appeals' construction of the choice-of-law clause at issue did not violate the principle, set forth in *Moses Cone*, that "questions of arbitrability . . . be resolved with a healthy regard for the federal policy favoring arbitration." *Id.* at 475. "There is no federal policy," the Court asserted, "favoring arbitration under a certain set of procedural rules," and since the California arbitration rules "generally foster the federal policy favoring arbitration," the Court of Appeal's interpretation of the choice-of-law clause was consistent with *Moses Cone*. *Id.* at 476 & n.5. The Court further held that application of Section 1281.2(c) to stay arbitration did not "undermine the goals and policies of the FAA," and was therefore not preempted. *Id.* at 477-78. The purpose of the FAA, the Court explained, was to "require[] courts to enforce privately negotiated agreements to arbitrate . . . in accordance with their terms." *Id.* at 478. "Where, as here, the parties have agreed to abide by state rules of arbitration," the Court concluded, "enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward." *Id.* at 479.

Invoking *Volt*, the Second and D.C. Circuits have both held that generic choice-of-law clauses incorporate state rules that restrict or prevent arbitration. In *Security Ins. Co. of Hartford*—a case, like this case and *Volt*, involving California Civil Procedure Code Section 1281.2(c)—the Second Circuit reviewed a contract with a generic California choice-of-law clause that provided: "[t]his Agreement shall be gov-

erned by and construed according to the laws of the state of California." 360 F.3d at 323 n.2. One party to the contract moved for a stay of arbitration pending a court proceeding. The district court granted the motion, and the Second Circuit affirmed. Citing *Volt*, the court concluded that Section 1281.2(c) was not preempted by the FAA. *Id.* at 326. It then turned to the question of the parties' intentions, and concluded—despite the fact that the clause was a standard, generic choice-of-law provision—that because the language of the choice-of-law clause was "broad and all encompassing," it incorporated Section 1281.2(c).

In *Ekstrom v. Value Health*, 68 F.3d 1391 (D.C. Cir. 1995), similarly, the D.C. Circuit analyzed a choice-of-law clause that provided: "[t]his Agreement shall be governed by and construed in accordance with the internal laws of the State of Connecticut." *Id.* at 1393. The district court ruled that, under this clause, Connecticut's 30-day clock, rather than the FAA's three-month window, governed the time to file a petition to vacate an arbitration award. The D.C. Circuit affirmed. The court interpreted the generic choice-of-law clause as incorporating Connecticut law governing the time limit for filing a challenge to an arbitration award. *Id.* at 1394-95. It also held, citing *Volt*, that the FAA did not preempt the applicable Connecticut law, because the FAA did not prevent parties from choosing rules different than the Act, but simply called for enforcing agreements according to their terms. *See id.* at 1395-96.

The highest courts of California and Tennessee have reached similar conclusions, as have intermediate courts in Illinois and Massachusetts. *See Cronus*, 107 P.3d at 217 (holding that state arbitration procedures presumptively apply to a contract with a generic choice-of-law clause); *Frizzell Construction Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79 (Tenn. 1999) (interpreting general Tennessee choice-of-law clause as requiring application of Tennessee arbitration rules, and therefore barring arbitration of a fraudulent inducement

claim); *Bishop v. We Care Hair Development Corp.*, 738 N.E.2d 610, 617 (Ill. App. Ct. 2000) (holding that generic Illinois choice-of-law provisions in franchise contracts "reflect an agreement by the parties to arbitrate in accordance with Illinois law"); *Thomson McKinnon Sec., Inc. v. Cucchiella*, 594 N.E.2d 870, 874 (Mass. App. Ct. 1992) ("By virtue of the choice of law provision of the contract, the remedy of punitive damages was prohibited.").

In the decision below, the California Court of Appeal reinforced this side of the split of authority. Purporting to apply *Volt* and the California Supreme Court's opinion in *Cronus*, it held that a generic California choice-of-law clause required application of California procedures that permitted the court to refuse to enforce an arbitration clause altogether. Strikingly, the Court of Appeal reached this conclusion not by deciding that the parties had expressly intended to choose California procedures, but rather by *presuming* that a generic California choice-of-law is intended to choose California procedure, absent an express indication that the FAA is to apply. This presumption is precisely the reverse of the presumption set forth by the FAA. *See Moses Cone*, 460 U.S. at 24-25.

* * * *

The broad conflict over the question presented here unquestionably merits review. To be clear, neither this case, nor the cases discussed above, turn on any individuated question of the contracting parties' subjective intent. That is, while parties are to some extent free to choose the procedures they wish to govern an arbitration, *see, e.g.*, *Mastrobuono*, 514 U.S. at 57, the question presented here arises when the parties have *not* made a specific choice about the rules they want to govern arbitration, but instead have simply designated a given state's law to govern the contract generally. Thus, the choice-of-law clauses at issue here merely provide that the contract will be "governed," "construed," "interpreted," or "enforced" according to the law of a par-

ticular state.[1] No special intent regarding arbitration procedures can be determined from parsing the words of the clauses, and the cases on either side of the split cannot be distinguished based on differences in the clauses at issue. Rather, relying on either *Mastrobuono* or *Volt*, the lower courts have simply interpreted the same basic contractual language differently, based on their conflicting assessment of the requirements of the FAA.

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[1] *See, e.g.*, *Security Ins. Co. of Hartford*, 360 F.3d at 323 ("This Agreement shall be governed by and construed according to the laws of the state of California."); *Ekstrom*, 68 F.3d at 1393 ("This Agreement shall be governed by and construed in accordance with the internal laws of the State of Connecticut."); *Cronus*, 107 P.3d at 220 (Cal. 2005) ("This agreement shall be construed and enforced in accordance with and governed by the laws of the State of California."); *Jacada*, 401 F.3d at 710 ("This Agreement will be governed by the laws of the State of Michigan."); *Puerto Rico Tel. Co.*, 427 F.3d at 23 ("This Contract shall be governed by and interpreted in accordance with the laws of the Commonwealth of Puerto Rico."); *Action Indus.*, 358 F.3d at 341 (5th Cir. 2004) ("The law of the State of Tennessee shall govern the execution and performance of this agreement."); *Roadway*, 257 F.3d at 288 (contract "shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania"); *UHC Management Co.*, 148 F.3d at 994 ("To the extent not preempted by . . . federal law, this Agreement shall [be] governed by and construed under the laws of the State of Minnesota."); *Ferro*, 142 F.3d at 932 ("all of the provisions of this Agreement and any questions concerning its interpretation and enforcement shall be governed by the laws of the State of Ohio"); *Porter Hayden Co.*, 136 F.3d at 382 ("All disputes concerning the validity, interpretation and application of the Agreement . . . and all disputes concerning issues within the scope of the Agreement shall be determined in accordance with applicable common law of the states of the United States."); *PaineWebber*, 87 F.3d at 591 ("[T]his agreement and its enforcement shall be construed and governed by the laws of the State of New York."); *Levine*, 714 A.2d at 652 (Conn. 1998) ("this agreement and its enforcement shall be governed by the laws of the State of New York").

II. THE CONFLICT IN THE COURTS IS ENTRENCHED AND SHOULD BE RESOLVED NOW

This conflict should be resolved now. It has persisted for more than ten years, and because it is rooted in the tension between this Court's decisions in *Mastrobuono* and *Volt*, it is unlikely to resolve itself. The conflict, moreover, has harmful practical effects, generating uncertainty over the meaning of the generic choice-of-law clauses found in almost every commercial contract, and undermining in multiple respects the policies and purposes of the FAA. This case, finally, presents a particularly good vehicle for resolving this issue.

A. The Conflict Reflects The Lower Courts' Difficulty In Reconciling *Mastrobuono* And *Volt*, And Will Therefore Persist Until This Court Intervenes

As the preceding discussion makes clear, the conflict in the lower courts is rooted in the apparent conflict between *Mastrobuono* and *Volt*. The tension between *Volt* and *Mastrobuono* is patent: in one case, this Court held that a generic choice-of-law provision could not be held to displace the FAA; in the other case, it held the reverse. *Cf. Mastrobuono*, 514 U.S. at 64 (Thomas, J., dissenting) ("the choice-of-law provision here cannot reasonably be distinguished from the one in *Volt*"). The apparent conflict between these cases has led to a widespread conflict in the lower courts.

This Court has identified two ways in which the cases can be reconciled. In *Mastrobuono*, this Court distinguished *Volt* by noting that in *Volt*, the Court had deferred to the California courts' interpretation of the contract at issue. *See Mastrobuono*, 514 U.S. at 60 n.4. And subsequently, in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), this Court suggested that *Volt* was limited to situations where a state rule determines "only the efficient order of proceed-

ings," and does not "affect the enforceability of the arbitration agreement itself." *Id.* at 688.

Neither distinction, however, is fully convincing. Although *Volt* discussed the deference generally due to a state court's interpretation of private contracts under state law, it also concluded that the California Court of Appeal's construction of the contract at issue in *Volt* was consistent with the FAA's requirement that arbitration agreements be construed in favor of arbitration. *See Volt*, 489 U.S. at 475-76. Moreover, this Court has consistently stated that the FAA was designed to ensure that the enforceability of an arbitration clause would not depend on the forum in which enforcement is sought. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984); *Allied-Bruce*, 513 U.S. at 272. And it is unclear that the distinction set forth in *Casarotto*, between a re-ordering of proceedings and a more substantial interference with arbitration, is substantively meaningful: as the dissenting opinion in *Volt* pointed out, "[a]pplying the California procedural rule, which stays arbitration while litigation of the same issue goes forward, means simply that the parties' dispute will be litigated rather than arbitrated." *Volt*, 489 U.S. at 487 (Brennan, J., dissenting).

In any event, the lower courts have not fully adopted these distinctions or applied them consistently. At least one of the courts that has followed *Volt* and applied state arbitration rules did so absent any state court determination of contractual intent. *See Security Ins. Co. of Hartford*, 360 F.3d at 322. Other courts have followed *Volt* despite the fact that application of a state rule would do more than merely reorder proceedings. *See, e.g., Frizzell Constr.*, 9 S.W.3d at 85-86. Still others—including the Court of Appeal in this case—have done so when both distinctions should have applied. *See, e.g.*, App. 24a-28a; *Ekstrom*, 68 F.3d at 1394-95; *Thomson McKinnon Sec.*, 594 N.E.2d at 871.

This Court's efforts to distinguish *Volt* and *Mastrobuono* have thus not sufficed to resolve the conflict in the lower

courts: despite these distinctions, the lower courts have continued to reach conflicting positions regarding the meaning of generic choice-of-law clauses, invoking either *Mastrobuono* or *Volt* for support. This conflict is therefore unlikely to be resolved unless and until this Court clarifies the continuing scope and viability of *Volt* in light of *Mastrobuono*.

B. The Conflict Is Having Harmful Practical Effects And Undermining The Purposes Of The FAA

The current uncertainty over the appropriate interpretation of generic choice-of-law clauses is having damaging practical effects and undermining the purposes of the FAA. *See, e.g., Security Ins. Co. of Hartford*, 360 F.3d at 323. As was noted earlier, generic choice-of-law clauses are found in almost every commercial contract. Such clauses make commercial sense, because they clarify the meaning of contractual provisions (by making clear which law will govern their interpretation), and help forestall expensive litigation over which law will apply in the event of a dispute. *See, e.g., Roadway*, 257 F.3d at 293.

Because of the split in authority over the correct interpretation of such clauses, however, parties who include them in their contracts cannot be sure of what effect, if any, they will have on the rules governing an arbitration under the contract. In some jurisdictions—including commercially important jurisdictions such as the Second Circuit, the D.C. Circuit, and the State of California—the presence of these clauses will have the dramatic (and likely unintended) effect of subjecting the arbitration to state procedural rules that may limit the arbitration or prevent it altogether. In other jurisdictions, the clause will operate as intended, choosing the law that will govern the interpretation of the contract. Further, if a dispute arises, parties will have a clear incentive to attempt to litigate the meaning of the choice-of-law clause in a jurisdiction that will construe the clause either broadly or narrowly, depending on whether they seek to evade or compel arbitration. This uncertainty, and the forum-shopping it encourages, is

commercially disruptive, and runs directly contrary to the FAA, which (as noted above) was enacted in part to establish uniform enforcement of arbitration clauses in every jurisdiction across the country. *See Southland*, 465 U.S. at 15; *Allied-Bruce*, 513 U.S. at 272.

Moreover, in those jurisdictions that follow *Volt*, the pro-arbitration policies of the FAA are being frustrated in at least two respects: arbitration agreements are neither being interpreted with a strong presumption in favor of arbitration, nor being fully enforced in accordance with their terms. As various courts have recognized, it is "beyond dispute that the normal purpose of" generic contractual choice-of-law clauses "is to determine that the law of one State rather than that of another State will be applicable; they simply do not speak to any interaction between state and federal law." *Volt*, 489 U.S. at 488 (Brennan, J., dissenting); *see also Mastrobuono*, 514 U.S. at 59; *Porter Hayden Co.*, 136 F.3d at 384 n.5 ("[C]hoice-of-law provisions typically embody the parties' choice of one state's laws over another's, rather than express a preference between federal and state law."); *Roadway*, 257 F.3d at 288, 293-94. This is confirmed by standard texts on conflicts-of-laws, the UCC, and the Restatement of Conflicts, none of which refers to or discusses the choice between federal and state law in its discussion of contractual choice-of-law clauses. *See* Restatement (Second) of Conflict of Laws § 187 (1986); E. Scoles & P. Hay, Conflict of Laws § 18 (4th ed. 2000); D. Siegel, Conflicts § 67 (2d ed. 1994). Accordingly, when parties include a generic choice-of-law clause in their contracts, they presumptively mean only to choose the substantive law that will govern interpretation of their contract—*not* to indicate that state arbitration rules will also govern their contract.

Those jurisdictions that purport to follow *Volt* and interpret generic choice-of-law clauses as choosing state procedures are thus ignoring the FAA's direction, clarified in *Moses Cone*, to interpret ambiguities in arbitration agree-

ments in favor of arbitration. As this Court recognized in *Mastrobuono*, a generic choice-of-law clause at *best* introduces an ambiguity into an arbitration agreement over whether state law applies. And under the FAA's pro-arbitration presumption, any such ambiguities must be construed in favor of arbitration. Those jurisdictions that purport to apply *Volt* are failing to do so.

These jurisdictions are also failing to enforce the parties' intent to arbitrate their agreements as fully as possible, in direct contravention of the FAA's purpose of ensuring that the arbitration agreements are fully enforced according to their terms. *See, e.g.*, *Mitsubishi Motors*, 473 U.S. at 631; *Moses Cone*, 460 U.S. at 24. In the present case, for example, the arbitration clause states without qualification that "[a]ll" disputes arising out of the contract will be resolved through arbitration. App. 5a. Despite this unequivocal provision, the court below invoked the parties' generic choice-of-law clause to override the parties' decision to arbitrate, applying California arbitration law and refusing to enforce the arbitration agreement at all. That result is antithetical to the policies and purpose of the FAA.

Indeed, the position adopted by those jurisdictions that purport to follow *Volt* threatens to render the FAA inapplicable to most agreements to arbitrate. As one court has recognized, "[m]ost contracts include a choice-of-law clause, and, thus, if each of these clauses were read to foreclose the application of the substantive law enacted by Congress in the FAA, the FAA would be applicable in very few cases. Such an interpretation of the FAA is simply not viable, as it would effectively emaciate the Act itself." *Ferro*, 142 F.3d at 938.

C. The Conflict Should Be Resolved Here

This case presents an exceptionally good vehicle for resolving this conflict of authority and clarifying the continuing viability and scope of *Volt* in light of *Mastrobuono*. Procedurally, this case is identical to the decision this Court re-

viewed in *Volt*: like that decision, this case involves an arbitration dispute in a contract with a California choice-of-law provision resolved by the California Court of Appeal. And, as here, the parties in *Volt* sought review from an unpublished Court of Appeal decision after review was denied by the California Supreme Court. *See Volt*, 489 U.S. at 472-73 ("The California Supreme Court denied Volt's petition for discretionary review."). Further, although the decision below is from the Court of Appeal, that court rested its decision squarely on the California Supreme Court's decision in *Cronus*. Accordingly, this is not a case in which the California Supreme Court's views are unknown, or in which review should await a decision by the state supreme court.

Substantively, the decision below directly implicates the tension between *Mastrobuono* and *Volt*, and sharply challenges the scope and viability of the FAA's interpretive presumption requiring ambiguities in arbitration agreements to be resolved in favor of arbitration. As discussed above, the Court of Appeal in this case ignored both of this Court's proposed distinctions between *Volt* and *Mastrobuono*, applying *Volt* and holding that a generic choice-of-law clause incorporated state procedures absent a state court determination of specific contractual intent, and where the state procedures did not simply re-order arbitration and litigation proceedings, but resulted in a refusal to enforce an arbitration agreement altogether. The Court of Appeal also applied a presumption—that California arbitration rules apply absent an express election of the FAA—that is precisely the reverse of the presumption set forth in the FAA. This case thus raises squarely the most central issues relevant to the conflict over the appropriate interpretation of generic choice-of-law clauses in contracts that provide for arbitration.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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June 19, 2007

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APPENDIX A

Court of Appeal, First Appellate District, Div. 2 - Nos. A112076/A113221
S150181

IN THE SUPREME COURT OF CALIFORNIA

En Banc

RAMBUS INC., *Plaintiffs and Respondents*,

v.

HYNIX SEMICONDUCTOR, INC., et al., *Defendants and Appellants*.

The petition for review is **DENIED**.

FILED IN THE SUPREME COURT:
March 21, 2007

/S/
Chief Justice

APPENDIX B

Filed 1/3/07 Rambus v. Hynix Semiconductor CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or order published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

RAMBUS INC., Plaintiff and Respondent, v. HYNIX SEMICONDUCTOR, INC. et al., Defendants and Appellants.	A112076, A113221 (San Francisco City and County Super. Ct. No. CGC-04-431105)

Rambus Inc. (Rambus) filed a complaint alleging that Hynix Semiconductor, Inc. and Hynix Semiconductor America, Inc. (collectively, Hynix); Samsung Electronics Co., Ltd. (SEC), Samsung Semiconductor, Inc., and Samsung Electronics America, Inc. (collectively Samsung); as well as other parties conspired with each other to fix the

price of dynamic random access memory, a type of memory chip, in violation of the Cartwright Act and other laws. Hynix and Samsung separately moved to compel arbitration pursuant to arbitration provisions in the contracts between Rambus and Hynix and between Rambus and Samsung. The trial court applied the California Rules of Arbitration (Code of Civ. Proc., § 1281 et seq.)[1] and exercised its discretion pursuant to section 1281.2, subdivision (c) to deny arbitration on the basis that at least one codefendant was not subject to an arbitration clause, and therefore arbitration caused a substantial risk of inconsistent results and undue duplication of efforts.

Hynix and Samsung separately appealed. At the parties' request, we consolidated the appeals. Both Hynix and Samsung contend the Federal Arbitration Act (FAA), title 9 United States Code section 1 et seq. applies, which does not provide the court with discretion to refuse to enforce an arbitration agreement. Their principal claims are that the plain language of their contracts establishes the parties' intent to have the FAA and not the California rules of arbitration govern the question of enforcing and interpreting the arbitration clause and the Supreme Court's holding in *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal. 4th 376 (*Cronus*) does not apply to their contracts. In addition, Hynix and Samsung assert the trial court should have applied the FAA due to the policy concerns related to international commercial arbitration agreements. We conclude that the trial court properly ruled that the California rules of arbitration apply; we therefore affirm.

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[1] All further unspecified code sections refer to the Code of Civil Procedure.

BACKGROUND

Rambus, Hynix, Samsung, and the other codefendants manufacture and sell various types of dynamic random access memory (DRAM) semiconductor chips. Rambus is a designer, developer, and licensor of a proprietary type of DRAM known as RDRAM (or Rambus-DRAM). Hynix[2] manufactures and sells various types of DRAM.

Rambus and Goldstar Electron Co., Ltd., which later merged into Hynix, entered into a 1994 Semiconductor Technology Agreement (Hynix agreement). Under the terms of the Hynix agreement, Hynix was granted a worldwide, nonexclusive, nontransferable license to develop, manufacture, market, and sell RDRAM, and was obliged to use its "best efforts" to do so.

Similarly, on November 7, 1994, Rambus entered into a Semiconductor Technology License Agreement with SEC, a Korean company (SEC agreement). Rambus granted SEC a license to, among other things, "make, . . . use, and sell Rambus DRAMS, Rambus-DRAM Boards, and Rambus-DRAM Systems." Pursuant to the SEC agreement, SEC was to "design, implement and manufacture" Rambus-DRAM, and "use its continuing best efforts to manufacture, reduce costs, market, and sell licensed Rambus-DRAMs."

Both the Hynix agreement and the SEC agreement (collectively, 1994 agreements) contain the following choice-of-law provision in section 9.1: "Governing Law.

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[2] The two Hynix entities are Hynix Semiconductor, Inc. and Hynix Semiconductor America, Inc. The latter is a corporation located in San Jose, California. The former is headquartered in Seoul, South Korea; it owns 96.57 percent of Hynix Semiconductor America, Inc.

This Agreement shall be governed by and interpreted in accordance with the laws of the State of California, U.S.A., without reference to conflict of laws principles."

The next paragraph, section 9.2, in the Hynix agreement, sets forth the following arbitration clause: "Arbitration. All disputes and differences between [Hynix] and Rambus arising out of or in connection with this Agreement shall be settled amicably through negotiations. In case such dispute or difference cannot be settled by such means, it shall be finally settled by binding arbitration in English. If action is initiated by [Hynix], such arbitration shall take place in San Francisco, California under the Commercial Rules of Arbitration of the American Arbitration Association by one arbitrator appointed in accordance with said rules. If action is initiated by Rambus, such arbitration shall take place in Seoul, Korea pursuant to the U.S. Korean Commercial Arbitration Agreement of December 1, 1974[,] by which each party is bound. The arbitrator shall apply California law to the merits of any dispute or claim, without reference to rules of conflicts of law or arbitration. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, the parties may apply to any court of competent jurisdiction for injunctive relief without breach of this arbitration provision."

Paragraph 9.2 of the SEC agreement provides: "Arbitration[:] Any dispute or claim arising out of or in connection with this Agreement shall be finally settled by binding arbitration conducted in the English language and held in the headquarters city of the party not initiating the claim under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by a panel of three (3) arbitrators. SEC and Rambus shall each select one of the arbitrators and such two arbitrators shall select the third arbitrator. The cost and expenses (including reasonable

counsel fees) of any such arbitrating shall be borne by the party against whom the award is rendered. The results of the arbitration shall be conclusive and binding upon the parties. The arbitrators shall apply California law to the merits of any dispute or claim, without reference to rules of conflicts of law or arbitration. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, the parties may apply to any court of competent jurisdiction for injunctive relief without breach of this arbitration provision."[3]

On May 5, 2004, Rambus filed a complaint against Hynix and others.[4] In June, Rambus added as "Doe" defendants the various Samsung entities. In the pleading, Rambus alleged conspiracy to restrict output and fix prices in violation of the Cartwright Act, conspiracy to monopolize in violation of the Cartwright Act, intentional interference with prospective economic advantage, and unfair competition.

Rambus refused Hynix and Samsung's separate demands for arbitration and both parties separately filed motions to compel arbitration. Hynix argued that section 9.2 in the 1994 agreement established that California rules should not apply to the question of arbitration. In particular,

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[3] The agreement between SEC and Rambus was amended in 1997, 2000, and 2003, but the amendments are not relevant to the issues raised by this appeal.

[4] Besides the two Hynix entities and the three Samsung entities, Rambus sued Micron Technology, Inc. and Micron Semiconductor Products, Inc. (collectively, Micron), Siemens AG and Siemens Corporation (collectively, Siemens), and Infineon Technologies AG and Infineon Technologies North America Corporation (collectively, Infineon). On March 21, 2005, Rambus filed a request for dismissal as to the Siemens and Infineon defendants following a settlement. Thus, Hynix, Micron, and Samsung remain as codefendants in the lawsuit.

with regard to the sentence that states, "This Agreement shall be governed by and interpreted in accordance with the laws of the State of California, U.S.A., without reference to conflict of laws principles[,]" Hynix asserted that "without reference" means "except as to."

After briefing and a hearing, the trial court denied Hynix's motion for the reasons set forth in its statement of decision filed on August 30, 2005. The court found that the Hynix agreement contained a valid and enforceable arbitration provision and Rambus's claims "'arise out of or in connection with'" the Hynix agreement. It also found that reading the choice-of-law clause and arbitration clause together established that the California rules of arbitration applied to the interpretation of the 1994 agreement. The court determined, "The words in Section 9.2 stating that 'without reference to rules of conflicts of law or arbitration' cannot be read to mean 'except in the areas of conflicts or law or arbitration.' That is not a reasonable reading of that phrase. Instead, Section 9.2 clearly states that the arbitrator is to apply California law to the merits of the claims even if a party asserts, for example, that South Korean rules of conflicts of law or arbitration would require otherwise. This is the only way to read that clause."

The trial court stated that under section 1281.2, subdivision (c) and *Cronus, supra,* 35 Cal. 4th 376, it has discretion to refuse to enforce an arbitration clause if the designated circumstances exist. The court found that such circumstances existed: "to allow the arbitration to go forward would cause a substantial risk of inconsistent results and undue duplication of efforts" because of pending litigation with codefendants Micron and Samsung.

Approximately two months later, on October 31, 2005, the trial court issued its statement of decision and order, which also denied Samsung's petition to compel

arbitration.[5] The court's reasons for denying Samsung's motion were essentially identical to the reasons it set forth in its statement of decision on Hynix's motion to compel arbitration.

Hynix and Samsung separately filed timely notices of appeal. At the parties' request, we consolidated the two appeals for oral argument and decision.

DISCUSSION

I. *Applying California Rules of Arbitration Rather than the FAA*

A. *Background*

The trial court ruled that Rambus's claims arise from the 1994 agreements, which contain an arbitration clause. The court, however, exercised its discretion under section 1281.2, subdivision (c), to refuse to enforce the arbitration clause. The record indicates that no arbitration agreement applies to codefendant Micron. Although Samsung and Hynix are subject to similar arbitration provisions, any arbitration with Hynix would be conducted pursuant to the U.S.-Korean Commercial Arbitration Agreement of December 1, 1974, while an arbitration with Samsung would be conducted separately pursuant to the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

Section 1281.2. provides: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it

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[5] The court also denied Micron's motion to compel arbitration.

determines that: [¶] . . . [¶] (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact.

"If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding. . . . [¶] . . . [¶]"

Hynix and Samsung maintain the court erred in exercising its discretion because the 1994 agreements establish the parties' intent to have the FAA apply to the issue of enforcing the arbitration clause. The FAA does not contain a provision similar to section 1281.2, subdivision (c). The federal statute was enacted in 1925 to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate" (*Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 U.S. 213, 219-220), and to place arbitration agreements "'upon the same footing as other contracts . . . .'" (*Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506, 511 (*Scherk*).)

Title 9 United States Code section 2 provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole

or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Thus, the FAA requires an arbitration agreement to be enforced even if multiple parties are involved who are not bound to arbitrate. (See, e.g., *Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 19-20, superseded by statue on other grounds.) "[A]rbitration should not be foreclosed simply by adding persons to a civil action who are not parties to the arbitration agreement because such an inclusion would thwart the federal policy in favor of arbitration." (*Encore Productions, Inc. v. Promise Keepers* (D. Colo. 1999) 53 F. Supp. 2d 1101, 1113.)

Although at times Hynix and Samsung appear to be arguing that the FAA preempts the California Rules of Arbitration, our Supreme Court has directly addressed that issue in *Cronus, supra,* 35 Cal. 4th 376, and held that it does not. The Supreme Court holds that section 1281.2, subdivision (c) applies to any arbitration agreement that includes a broad California choice-of-law provision unless the parties to an arbitration agreement *"expressly* designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law." (*Cronus, supra,* 35 Cal. 4th at 394.) The court further elaborated, "In *Volt Info. Sciences, Inc. v. Leland Stanford Univeristy* (1989) 489 U.S. 468 . . . (*Volt*), the United States Supreme Court held that the [FAA], which applies to and favors the enforcement of arbitration agreements affecting interstate commerce, does not preempt the application of section 1281.2, subdivision (c) where the parties have agreed that their arbitration agreement would be governed by the law of California. (*Cronus, supra,* at 380.)

Accordingly, in agreements such as the present ones, where the parties expressly stated that the agreements are to be governed and interpreted in accordance with California law, the California rules of arbitration apply unless the 1994 agreement "*expressly*" designates that the FAA procedural rules should govern the enforcement of the arbitration clause.

B. *Interpreting the Choice-of-law and the Arbitration Provisions in the 1994 Agreement*

We examine the language of the 1994 agreements to determine whether the parties intended to apply the FAA to the exclusion of California procedural law. (*Cronus, supra,* 35 Cal. 4th at 383.) Whether section 1281.2, subdivision (c) should be applied to the 1994 agreements is a legal question to be reviewed de novo. (*See, e.g., Rodriguez v. American Technologies, Inc.* (2006) 136 Cal. App. 4th 1110, 1117.)

In interpreting the choice-of-law provision in the 1994 agreements, we conduct our review under settled principles. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) Where contract language is clear and explicit and does not lead to absurd results, we ascertain intent from the written terms. (*Ticor Title Ins. Co. v. Employers Ins. of Wausau* (1995) 40 Cal. App. 4th 1699, 1707.) "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Civ. Code, § 1643.) "Courts must interpret contractual language in a manner which gives force and effect to *every* provision, and not in a way which renders some clauses nugatory, inoperative or meaningless." (*City of*

Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1998) 68 Cal. App. 4th 445, 473.)

The 1994 agreements provide in section 9.1 that the agreement between Rambus and Hynix and the agreement between Rambus and SEC "shall be governed by and interpreted in accordance with the laws of the State of California, U.S.A., without reference to conflict of laws principles." Section 9.2 directly follows and both the Hynix and SEC agreements include the following language: "The arbitrator shall apply California law to the merits of any dispute or claim, without reference to rules of conflicts of law or arbitration. . . ."

We agree with the trial court's interpretation of the plain meaning of these provisions. The broad choice-of-law provision expressly states that California law governs. Section 9.2, the arbitration provision, directs the arbitrator to apply California law to the merits of the dispute even if California rules of conflicts of law or arbitration would provide that the law of another jurisdiction should apply to the merits. Nowhere in the agreement is there any provision that states federal law rather than California law should apply to the procedure of selecting arbitration.

Hynix and Samsung insist that the words "without reference to" in section 9.2 mean "except as to" or "except in the areas of." They assert that "without reference to" means that California law shall be applied "excluding" the "appli[cation]" or "pertinen[ce]" of rules of arbitration. They submit various definitions from the dictionary of "without," such as "exempt or free from." Hynix also cites dictionary definitions of "reference," such as "being pertinent" or "bearing on something" or "the act of consulting." Hynix proceeds to insert these definitions into the arbitration clause and claims that the parties' arbitration clause means: "'free from [or] excluding' 'reference to rules of . . . arbitration'; or 'not using' or 'apply[ing]'

rules . . . arbitration'; or 'without' 'consulting' or 'apply[ing]"rules of . . . arbitration.'"

Hynix and Samsung are attempting to rewrite the arbitration provision. Even if we were to insert the definitions urged by Hynix and Samsung to "without reference" into the arbitration clause, we would not agree that this provision would require the court to apply the procedural arbitration rules of the FAA. Using the definitions provided by Hynix and Samsung, without rewriting other phrases in the clause, the result is: "The arbitrator shall apply California law to the merits of any dispute or claim," free from the act of consulting "rules of conflicts of law or arbitration. . . ." The plain meaning of the sentence is that the arbitrator is to apply California law to the merits of any dispute or claim even if there are contrary rules of law or arbitration from other jurisdictions. The clause remains silent about the procedural rules that the court should apply in determining the availability of arbitration.

Not only are Hynix and Samsung attempting to rewrite the arbitration provision, they are attempting to ignore the antecedent phrase that makes it clear this provision only applies to the law the arbitrator is to apply to the merits of the dispute.[6] Thus, any consideration of the contract as a

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[6] In its reply brief, Hynix contends that the reference to "the merits" of a dispute applies equally to addressing "the merits" of the petition to compel arbitration. (See *Rosenthal v. Great Western Fin. Secs. Corp.* (1996) 14 Cal. 4th 394, 402.) The words that directly follow this phrase, "without reference," therefore, according to Hynix, exclude California rules on the issue of enforcing the arbitration clause. This argument makes little sense. Arbitrators have the authority to determine whether they have jurisdiction over the matter and the merits of a dispute, but they do not have the authority to determine whether an arbitration clause is enforceable. Consequently, the first part of the sentence refers to the determination of the merits of the dispute or the arbitrator's authority over the dispute. Furthermore, for the reasons already discussed, it would not matter if the first part of the sentence was all-encompassing because

whole, results in an interpretation that the parties expressly intended California law to apply and there is no provision that expressly or even implicitly states that the FAA's procedural rules of arbitration apply.

Hynix cites to a number of cases and asserts that these cases have interpreted a similar provision in the manner urged by Hynix. (See, e.g., *In re Valle Redondo* (Tex. App. 2001) 47 S.W.3d 654, 660 ["The Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of Texas, without reference to the conflicts of law rules of the State of Texas"].)[7] The arbitration clauses in these cases cited by Hynix merely specified that the parties' choice of law could not be circumvented by applying rules that might provide that another jurisdiction's law should apply. None of the cases cited contained a provision similar to the one before us.

Finally, Hynix and Samsung contend that interpreting the arbitration clause as being limited to the arbitrator's

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we refuse to rewrite the second part of the sentence to state that it is excluding California rules of arbitration.

[7] The other cases cited by Hynix are: *Union Oil Co. of California v. John Brown E&C* (N.D. Ill. Sep. 30, 1994, No. 94 C 4424) 1994 WL 535108, *1 ("This contract shall be construed, interpreted, and enforced in accordance with the laws and jurisprudence of the State of California, and without reference to California's rules regarding Conflict of Laws"); *Trust One Mortgage Corp. v. Invest America Mortgage Corp.* (2005) 134 Cal. App. 4th 1302, 1306 ("This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of California without reference to the choice of law principles thereof"); *Choice Hotels Intl, Inc. v. Grose* (D. Md. Aug. 19, 2005, No. Civ. A. RWT 03-3052) 2005 WL 2044001, *1 ("The arbitrator will apply the substantive laws of Maryland, without reference to its conflict of laws provision"); and *Cronus*, *supra*, 35 Cal.4th at p. 387 ("'This agreement shall be construed and enforced in accordance with and governed by the law of the State of California, without giving effect to the conflict of laws provisions thereof'").

determination of the merits of the case renders the language "without reference to rules of . . . arbitration" meaningless and mere surplusage. This argument has little merit. This language is not surplusage because the choice-of-law provision does not address conflicts of laws principles, which are directly focused on by the arbitration provision. Additionally, the choice-of-law provision applies only to the 1994 agreements, and other claims, such as torts, may go beyond the 1994 agreements. Claims that go beyond the 1994 agreements would be governed by California law under the arbitration provision.[8]

Further, our interpretation of the arbitration provision comports with the holding in *Cronus* in the respect that the Supreme Court specified the FAA will apply to an arbitration agreement when the parties *"expressly* designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law." *(Cronus, supra,* 35 Cal. 4th at 394.) Here, the 1994 agreements do not mention the FAA and therefore their provision selecting California law applies.

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[8] Samsung also argues that the more specific language of the arbitration clause must govern over the more general provision of section 9.1. (*See Furtado v. Metropolitan Life Ins. Co.* (1976) 60 Cal. App. 3d 17, 25.) It is an elementary rule of contract law that "'a specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, even though the latter, standing alone, would be broad enough to include the subject to which the more specific provision relates.'" (*Ibid.*) However, the narrow provision regarding arbitration does not, as Samsung argue, exclude application of California rules of arbitration from the otherwise applicable body of California law. As already stressed, the specific provision of section 9.2 directs the arbitrator to apply California law to the merits of the dispute even if California rules of conflicts of law or arbitration would provide that the law of another jurisdiction should apply to the merits. This provision is consistent with the broad choice-of-law provision in section 9.1.

Accordingly, we conclude that the clear language of section 9.2 in the 1994 agreements provide that the arbitrator is to apply California law to the merits of the case without reference to the conflict of laws provisions or arbitration rules of any jurisdiction.[9]

C. *Comparing the Arbitration Agreements in Cronus with the Arbitration Clause in the 1994 Agreements*

Hynix and Samsung maintain that the trial court improperly relied on *Cronus* because the language used in the agreements in that case is distinguishable from the operative language in the 1994 agreements between Rambus and Hynix and Rambus and Samsung. In particular, the agreements in *Cronus* used the word "enforced" and the 1994 agreements contained no such language. Hynix and Samsung claim this is a critical distinction.

In *Cronus,* the breach of contract action involved various parties and six separate agreements. (*Cronus, supra,* 35 Cal.4th at 380-381.) Four of the six agreements provided for the arbitration of any disputes between the parties "'arising out of, in connection with, or in relation to the interpretation, performance or breach of this Agreement . . ." (*Id.* at 381, fn. omitted.) The arbitration clause provided as follows: "'The designation of a situs or specifically a governing law for this agreement or the arbitration shall not be deemed an election to preclude application of the [FAA],

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[9] Rambus maintains that any ambiguities must be resolved in favor of applying section 1281.2, subdivision (c). (See, e.g., *Cronus, supra,* 35 Cal. 4th at 393 ["Thus, we need not construe any ambiguities as to the scope of the arbitration provision against the application of section 1281.2, subdivision (c)"].) In contrast, Hynix and Samsung assert ambiguities must be construed in favor of applying the FAA. (See, e.g., *Cronus, supra,* at 386 ["Any doubts or ambiguities as to the scope of the arbitration clause itself should be resolved in favor of arbitration"].) We need not resolve this issue because we conclude the meaning of section 9.2 is not ambiguous.

if it would be applicable.'" (*Ibid.*, fn. omitted.) The agreements also contained the following choice-of-law clauses: "'[t]his agreement shall be construed and enforced in accordance with and governed by the laws of the State of California, without giving effect to the conflict of laws provisions thereof.'" (*Ibid.*)

In contrast to the foregoing, Hynix argues that the 1994 agreements specifically refer to California rules of arbitration and, according to Hynix "expresses the parties' intent to *exclude* such arbitration rules from applying to the merits of any of their disputes[.]" As discussed *ante,* we reject Hynix's interpretation of the arbitration clause as carving out an exception for California's rules of arbitration and therefore this "manufactured" difference between the 1994 agreements and the one in *Cronus* does not exist.

Hynix and Samsung also argue that the parties in *Cronus* did not dispute whether the choice-of-law provision incorporated the California rules of arbitration and the provision in *Cronus* specified that the agreement would be "enforced" in accordance with California law. (*Cronus, supra,* 35 Cal. 4th at 381.) The *Cronus* court, according to both Hynix and Samsung, focused on the word "enforced" because this language "reasonably includes such matters as whether proceedings to enforce the agreement shall occur in court or before an arbitrator." (*Id.* at 387.) The 1994 agreements state that they will be "governed by and interpreted in accordance with the laws of the State of California" and therefore they do not have the "enforcement" language and, according to Hynix and Samsung, are distinguishable from the agreements in *Cronus.*

Further, Samsung argues that it was particularly significant that the court in *Cronus* quoted and relied on *Mount Diablo Medical Center v. Health Net of California, Inc.* (2002) 101 Cal. App. 4th 711, 722 (*Mount Diablo*). Samsung maintains that the court in *Mount Diablo*

distinguished between a choice-of-law provision that uses the word "enforcement" from a provision, such as section 9.1 in the 1994 agreements, that states the agreement would be governed by the law of a particular jurisdiction without reference to enforcement. When concluding that the choice-of-law provision did apply to the rules of arbitration in the case before it, the *Mount Diablo* court explained: "The choice-of-law provision in the present case may be 'generic' in the sense that it does not mention arbitration or any other specific issue that might become a subject of controversy, but it is nonetheless broad, unqualified and all-encompassing. It provides that '[t]he validity, construction, interpretation and enforcement of this Agreement' shall be governed by California law. The explicit reference to enforcement reasonably includes such matters as whether proceedings to enforce the agreement shall occur in court or before an arbitrator." (*Id.* at 722.)

The court in *Mount Diablo* did distinguish the "enforcement" language of the choice-of-law provision in the agreement before it from other federal cases that held the FAA procedural rules applied when the contracts simply stated that the agreement would be governed by the law of a particular jurisdiction, without reference to enforcement. (*Mount Diablo, supra,* 101 Cal. App. 4th at 722-723, citing *Nat. Union Fire Ins. Co. v. Belco Petroleum Corp.* (2d Cir. 1996) 88 F.3d 129, 132 ["'The construction, validity and performance of this policy shall be governed by the law of the State of New York, U.S.A.'"]; *Porter Hayden Co. v. Century Indem. Co.* (4th Cir. 1998) 136 F.3d 380 382 ["'All disputes concerning the validity, interpretation and application of the Agreement . . . and all disputes concerning issues within the scope of the Agreement shall be determined in accordance with applicable common law of the states of the United States'"]; *UHC Management Co. v. Computer Sciences Corp.* (8th Cir. 1998) 148 F.3d 992, 994, 997 ["'To the extent not preempted by ERISA or other federal law, this

Agreement shall [be] governed by and construed under the laws of the State of Minnesota.'" "[T]the choice-of-law clause itself specifically provides that Minnesota law must yield whenever preempted by federal law, which cuts against the argument that the parties intended that the FAA not apply"].) The *Mount Diablo* decision, which preceded the Supreme Court's decision in *Cronus,* did not consider that the foregoing federal cases did not rely on the California state court's construction of the parties' agreement to incorporate certain California rules. A few years after Division Three of our court issued *Mount Diablo,* our Supreme Court in *Cronus* held that section 1281.2, subdivision (c) applies to any arbitration agreement that includes a broad California choice-of-law provision unless the parties to an arbitration agreement *"expressly* designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law."[10] (*Cronus, supra,* 35 Cal. 4th at p. 394.) Thus, none of these federal cases were concerned with *Cronus* or any California precedent.

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[10] Samsung contends that the Supreme Court in Cronus cited with approval and relied upon Mount Diablo and therefore it implicitly agreed that the word "enforce" must be contained in the choice-of-law provision. However, the Cronus court did not limit its holding to choice-of-law provisions with "enforcement" language and Cronus did not mention the federal cases cited in *Mount Diablo.* (*See Mount Diablo, supra,* 101 Cal. App. 4th at 722-723, and cases cited therein.) The Cronus court acknowledged that the choice-of-law provision in the agreements before it was "substantially similar" to the provisions in *Mount Diablo* and *Volt.* (*Cronus, supra,* 35 Cal. 4th at 387.) Samsung ignores that Volt did not use the word "enforce" but stated that the contract "'shall be governed by the law of the place where the Project is located [California.]'" (*Volt, supra,* 489 U.S. at 470.) Thus, the Supreme Court in Cronus considered the language of "governed by the law" in *Volt* as "substantially similar" to the language in the agreements before it. (*Cronus, supra,* at 381.) Accordingly, we conclude that the Supreme Court in *Cronus* did not limit its holding to choice-of-law provisions containing the word "enforce."

Finally, in its reply brief, Samsung argues that *Cronus* is distinguishable because it involved a domestic contract, while the 1994 agreements are international contracts. (*See Cronus, supra,* 35 Cal. 4th at 384.) However, our Supreme Court's holding in *Cronus* was broad and it did not limit its applicability to domestic contracts. Samsung attempts to bolster this argument by extricating language from *Scherk, supra,* 417 U.S. at 515, where the court stated that court precedent involving a domestic agreement "ignores the significant and, we find, crucial differences between" domestic agreements and a "truly international agreement."

The question whether an agreement is "truly international" is a question of fact, which Samsung failed to raise in the lower court. Moreover, the facts in *Scherk* are distinguishable from the facts in the case before us. In *Scherk,* the property being purchased was that of three businesses organized under the law of Germany and Liechtenstein. Negotiation for the contract occurred in the United States, England, and Germany and involved consultations with legal and trademark experts from these countries and from Liechtenstein. The contract was signed in Austria. The businesses being bought were engaged in activities, "largely if not entirely, directed to European markets." (*Id.* at 515.) The fragmentary contacts with the United States of the contract in *Scherk* distinguish that contract from the 1994 contracts.

Further, the *Scherk* court was not concerned with applying California rules or California precedent. In *Scherk,* the contract contained an arbitration clause providing that "'any controversy or claim [that] shall arise out of this agreement or the breach thereof would be referred to arbitration before the International Chamber of Commerce in Paris, France, and that [t]he laws of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance.'" (*Scherk, supra,* 417 U.S. at 508, fn. omitted.)

An action was commenced in the district court under the Securities Act of 1933. (*Scherk, supra,* at 509-510.) The lower courts held that an agreement to arbitrate could not preclude a buyer of security from seeking a judicial remedy under the Securities Act of 1933. *(Scherk, supra,* at 510.) Thus, the United States Supreme Court in *Scherk* was concerned with reconciling two federal statutes in conflict. (*Id.* at 517.) With two federal statutes in conflict, the considerations of international commerce tipped the balance and the court chose to apply the FAA. (*Scherk, supra,* at 517.) No such conflict exists in the present case and our Supreme Court has made it clear that California procedural rules apply unless the agreement specifically states that federal procedural rules are to apply. (*Cronus, supra,* 35 Cal. 4th at 394.)

Accordingly, we are unpersuaded by the argument that omitting enforcement language is a critical distinction between the present case and *Cronus.* The *Cronus* court does not state or imply that the word "enforcement" is necessary for a choice-of-law provision to be effective. Indeed, the *Cronus* court cited the choice-of-law provision in *Volt, supra,* 489 U.S. 468. Volt did not use the word "enforce" but stated that the contract "'shall be governed by the law of the place where the Project is located [California.].'" (*Id.* at 470.) It is true that the United States Supreme Court deferred to the California M Court of Appeal's construction of this provision as incorporating California arbitration law (*id.* at 474), but our Supreme Court in *Cronus* did not indicate there was any problem with this construction when relying on the *Volt* decision and discussing it in depth (*Cronus, supra,* 35 Cal. 4th at 386-387).

Accordingly, we reject Hynix and Samsung's contention that the choice-of-law provision is only effective in incorporating the California rules of arbitration when it contains the word "enforce" or "enforcement." Rather, as discussed *ante,* when an agreement is "governed and

interpreted" under California law and there is no provision expressly stating that the arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law (*Cronus, supra,* 35 Cal. 4th at 394), California rules of arbitration apply.

D. *Effect of Selecting Two Alternative Venues for Arbitration*

Hynix and Samsung contend that the parties' intent not to have the California rules of arbitration apply is indicated by the 1994 agreements' requirement to have the arbitration in either South Korea or California, depending upon which party initiates the action.[11] Hynix and Samsung then cite to the arbitration rules under the California International Arbitration Act (§ 1297.11 *et seq.*) and argue that the application of these rules would result in a lack of symmetry, because two different results would occur depending upon whether an international commercial arbitration takes place in or out of California.

The lack of symmetry would result, according to Hynix and Samsung, because the California International Arbitration and Conciliation Act applies to international arbitrations held

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[11] The arbitration section in the Hynix agreement reads in relevant part: "If action is initiated by [Hynix], such arbitration shall take place in San Francisco, California under the Commercial Rules of Arbitration of the American Arbitration Association by one arbitrator appointed in accordance with said rules. If action is initiated by Rambus, such arbitration shall take place in Seoul, Korea pursuant to the U.S.-Korean Commercial Arbitration Agreement of December 1, 1974[,] by which each party is bound."

The arbitration provision in the SEC agreement states in relevant part: "Any dispute or claim arising out of or in connection with this Agreement shall be finally settled by binding arbitration conducted in the English language and held in the headquarters city of the party not initiating the claim under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by a panel of three (3) arbitrators."

in California. (§ 1297.12.) Therefore, if the arbitration occurs outside California, this Act will not apply. Hynix and Samsung assert that section 1281.2 is superseded and does not apply when an international arbitration takes place in California. (§ 1297.17.)[12] Thus, under these rules, Hynix and Samsung maintain the court would not have discretion to deny the motion to compel arbitration in California. However, if the arbitration were outside California and in Korea, the court would have the discretion to deny arbitration under section 1281.2. Hynix and Samsung argue that the parties could not have intended such an unbalanced result.

Section 1297.11 contains no provision concerning how a court is to act in the circumstance where there are multiple parties with different arbitration requirements. Thus, it is possible that section 1281.2, subdivision (c) would apply, notwithstanding section 1297.12, for the same reasons the FAA does not preempt section 1281.2, subdivision (c). In any event, neither Hynix nor Samsung presented any evidence that the parties were aware of this asserted inconsistent result under section 1297.11 et seq. when contracting or that they intended to avoid having a result that lacked symmetry.

Additionally, Samsung maintains that the SEC agreement provided that the arbitration would be conducted under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. It claims that this provision, itself, is

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[12] Section 1297.17 provides: "This title shall not affect any other law in force in California by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only in accordance with provisions other than those of this title. Notwithstanding the foregoing, this title supersedes Sections 1280 to 1284.2, inclusive, with respect to international commercial arbitration and conciliation. This title applies to international commercial arbitration and conciliation, subject to any agreement which is in force between the United States and any other state or states."

sufficient to require the federal procedural rules regarding arbitration to apply and establishes that the parties did not intend California rules of arbitration to apply. (*See Scherk, supra,* 417 U.S. at 519 ["An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute"].) As already stressed, our Supreme Court holds that California procedural law governs when the parties choose California law to govern their agreement unless the parties expressly specify that the FAA's procedural provisions apply. (*Cronus, supra,* 35 Cal. 4th at 380, 394.) We therefore conclude that this clause is insufficient, by itself, to establish that the parties intended to have the procedure rules of the FAA apply.

II. *The FAA*

Hynix and Samsung maintain that the FAA precludes application of section 1281.2, subdivision (c). They assert that the 1994 agreements involve international commerce between Korean and American entities and therefore the FAA applies to the dispute. (*See* 9 U.S.C. §§ 1-2.) They contend that the arbitration provision in the 1994 agreements essentially designated that the arbitration proceeding should move forward under the FAA.

Rambus does not dispute that the substantive provisions of the FAA apply in the present case because of the 1994 agreements' connections with interstate and international commerce. (*See* 9 U.S.C. § 1.) However, it points out the distinction between the FAA's substantive provisions (9 U.S.C. §§ 1 & 2), which advance a general congressional policy in favor of arbitration, and the procedural provisions (9 U.S.C. §§ 3 & 4), which govern the enforcement of an arbitration agreement in federal court. The United States Supreme Court in *Volt, supra* 489 U.S. 468, stated that "we have never held that [sections] 3 and 4 [of the FAA], which by their terms appear to apply only to proceedings in federal

court [citation], are nonetheless applicable in state court." (*Volt,* at 477, fn. 6.) Similarly, our Supreme Court states "the United States Supreme Court does not read the FAA's procedural provisions to apply to state court proceedings." (*Cronus, supra,* 35 Cal. 4th at 389.)

Title 9 United States Code section 2 does not authorize courts to stay or deny arbitration in circumstances involving multiple parties, but this is a procedural provision. To force the parties to arbitrate under the FAA's procedural rules where they have not expressly agreed to do so, "would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." (*Volt, supra,* 489 U.S. at 479.) Thus, in *Volt,* the United States Supreme Court upheld the application of section 1281.2, subdivision (c) to an arbitration provision governed by the FAA. The contract at issue, a construction agreement for work to be performed in California, contained a clause applying "'the law of the place where the Project is located.'" (*Volt, supra,* at 470.) The Supreme Court rejected a preemption claim, declaring the FAA "do[es] not prevent application of [section 1281.2, subdivision (c)] to stay arbitration where, as here, the parties have agreed to arbitrate in accordance with California law." (*Volt, supra,* at 477.) It also acknowledged "California has taken the lead in fashioning a legislative response" governing "the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate" (*Volt, supra,* at 476, fn. 5), and held, "Interpreting a choice-of law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to encourage resort to the arbitral process—simply does not offend the rule of liberal construction . . . , nor does it offend any other policy embodied in the FAA." (*Id.* at 476.)

As discussed *ante*, our Supreme Court holds that when the parties choose California law to govern their agreement, the procedural sections of the FAA are not applicable." (*Cronus, supra,* 35 Cal. 4th at 380.) However, the parties to an, ... arbitration agreement may "*expressly* designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law." (*Cronus, supra,* at 394.)

Although the arbitration clause in the 1994 agreements between Rambus and Hynix and between Rambus and Samsung do not expressly state that the FAA's procedural rules apply, Hynix maintains that this arbitration clause is "functionally equivalent to the arbitration clause at issue" in *Rodriguez v. American Technologies, Inc., supra,* 136 Cal. App. 4th 1110 (*Rodriguez*). In *Rodriguez,* the appellate court held the lower court erred when it applied the California rules of arbitration in denying the motion to compel arbitration because the parties' agreement clearly articulated an intent for the FAA procedural rules to apply. (*Rodriguez, supra,* at 1114.) Similarly, here, Hynix asserts that "the 1994 Agreement entered into by Hynix and Rambus effectively contained such a designation because the parties plainly excluded California arbitration rules in the context of a commercial arbitration agreement intrinsically subject to the FAA."

As discussed *ante*, the arbitration clause in the 1994 agreements did not expressly designate that the FAA procedural rules were to apply; in fact, there is no mention of the FAA. The agreements do not "functionally" or "effectively" adopt the FAA but, even if they did, that would be insufficient under *Cronus,* which requires that the agreement must "*expressly* designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law." (*Cronus, supra,* 35 Cal. 4th at 394.) Indeed, even

though the agreement in Cronus—unlike the 1994 agreements—specifically stated that "'[t]he designation of a situs or specifically a governing law for this agreement or the arbitration shall not be deemed an election to preclude application of the [FAA],'" the court held that was insufficient to preclude application of section 1281.2, subdivision (c). (*Cronus, supra,* at 381, 393.)

Hynix's reliance on *Rodriguez* is unavailing. In *Rodriguez,* the arbitration provision at issue stated the following: "'Pursuant to the Federal Arbitration Act, any controversy or claim arising [out] of or related to this Agreement or the breach of any provision thereof shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect, unless the parties mutually agree otherwise.'" (*Rodriguez, supra,* 136 Cal. App. 4th at 1116, 1121.) Further, the agreement in *Rodriquez* did not have a choice-of-law provision designating California law. (*Ibid.*)

The *Rodriguez* court applied the holding in *Cronus* and concluded that "the language of the contract requires the parties to arbitrate 'in conformance to' and 'agreement with' the FAA. There is *no* other contract provision suggesting the parties intended to incorporate California arbitration law, nor is there any language suggesting the parties intended to arbitrate 'in conformance to' some provisions of the FAA but not others. The phrase 'pursuant to the FAA' is broad and unconditional, unlike the *Cronus* clause, which deferred to the contract's California choice-of-law provision by invoking only 'applicable' provisions of the FAA [¶]. Thus, there is no ambiguity regarding the parties' intent. They adopted the FAA—all of it—to govern their arbitration." (*Rodriguez, supra,* 136 Cal. App. 4th at 1122.)

Contrary to the contract in *Rodriguez,* which contained a broad provision invoking the FAA, the 1994 agreements

never refer to the FAA. Moreover, the agreement in *Rodriguez,* unlike the 1994 agreements, did not have a choice-of-law provision designating California law. Accordingly, the *Rodriguez* decision does not compel a result different from the ruling made by the trial court in the present case. We hold under the reasoning of *Volt, Cronus,* and *Rodriguez,* the California rules of arbitration apply to the 1994 agreements between Rambus and Hynix and Rambus and Samsung. The 1994 agreements contain a broad California choice-of-law clause and fail to designate the FAA as governing the enforcement or the interpretation of the arbitration provision.

III. *International Agreements*

A. *Policy*

Hynix and Samsung argue that the 1994 agreements between them and Rambus differ significantly from the agreements at issue in *Volt* and *Cronus* in that their agreements with Rambus involve an international commercial dispute. They claim that the policy considerations favoring arbitration are even stronger in the international commerce context. (*See Kerr-McGee Chemical, LLC v. Kemira Pigments Oy* (D. Del. Oct. 7, 2003, No. Civ. A. 03-191-GMS) 2003 WL 22299045, *5 [policy favoring arbitration is even stronger where parties are international]; *Dial 800 v. Fesbinder* (2004) 118 Cal. App. 4th 32, 49; *Fotochrome, Inc. v. Copal Company, Limited* (2nd Cir. 1975) 517 F.2d 512, 516 ["[t]he public policy in favor of international arbitration is strong"]; *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 631.)

Samsung quotes the following language from the United States Supreme Court decision in *Scherk:* "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical

litigation advantages. . . . [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." (*Scherk, supra,* 417 U.S. at 516-517.) However, Samsung fails to cite the language immediately preceding this paragraph, which is as follows: "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved." (*Id.* at 516, fn. omitted.) Thus, the Supreme Court restates the policy of enforcing choice-of-law provisions and admonishes courts not to frustrate this policy by not enforcing such choice-of-law provisions when they specify a forum in a foreign country.

Scherk as well as numerous other cases reaffirm the strong policy favoring the enforcement of arbitration agreements in the international commerce context. However, there is no authority that suggests the international nature of an agreement precludes the application of section 1281.2, subdivision (c). Arbitration is strongly favored and any doubts concerning the scope of arbitrable issues are resolved in favor of arbitration *in all types* of disputes, under both the FAA and California law and public policy. (*See, e.g., Ruiz v. Sysco Food Services* (2004) 122 Cal. App. 4th 520, 538.) As discussed *ante,* both the United States and California Supreme Courts have held that section 1281.2, subdivision (c) is consistent with the federal policy in favor of arbitration and neither court carved out an exception for agreements involving international commerce. (*Volt, supra,* 489 U.S. at 476 & fn. 5; *Cronus, supra,* 35 Cal. 4th at 383-386.) "There is no federal policy favoring arbitration under a

certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." (*Volt, supra,* at 476.) Thus, the sophisticated parties in the present case were clearly free to expressly state that federal procedural rules were to govern the enforcement of the arbitration clause.

Hynix and Samsung also cite to the Chapter II of the FAA, tile 9 United States Code section 200 *et seq.*, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention)[13] as bolstering their argument that the rules are different for agreements involving international commerce.[14] Samsung argues that the holding

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[13] "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter." (9 U.S.C. § 201.) According to the United States Supreme Court in *Mitsubishi Motors v. Soler Chrysler-Plymouth, supra*, 473 U.S. at 619, footnote 3: "Article II of the Convention . . . provides: [para] '1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.'"

"'3. . . . . .
The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.' 21 U.S. at 2519. Title 9 U.S.C. § 203 confers jurisdiction on the district courts of the United States over an action falling under the Convention."

[14] Rambus asserts that this issue was not raised below and therefore it cannot be raised for the first time on appeal. Samsung responds that it moved to compel arbitration pursuant to the FAA. However, it moved to compel arbitration pursuant to section 1218.4 and section 2 and 3 of the FAA. It did not cite section 201 of the FAA in any of its papers in the lower court.

in *Cronus* is irrelevant to the present case because *Cronus* did not involve section 201 of the FAA and the court merely concluded that sections 3 and 4 of the FAA did not apply in the state courts. Samsung's argument is perplexing given that its papers in the lower court in support of its petition to compel arbitration mention sections 2 and 3 of the FAA, but never mention section 201 of the FAA.[15]

Even if we presume that Samsung has preserved this issue on appeal, we conclude that this attempt to distinguish the 1994 agreements from the agreements in *Cronus* has no merit. The *Cronus* court analyzed sections 3 and 4 of the FAA. Based on the language of the statutes and legislative history, the *Cronus* court concluded the FAA's procedural provisions generally do not apply to state court proceedings. This analysis applies with equal force to the 1994 agreements. The *Cronus* court stressed that the FAA's purpose is not to provide special status for arbitration agreements, but only "'to make arbitration agreements as

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[15] "Section 3 of the FAA concerns the enforcement of arbitration agreements in a pending lawsuit. It requires the 'courts of the United States' to grant a party's request for a stay of litigation on an arbitrable issue, pending completion of the arbitration [citation]. Section 4 of the FAA concerns petitions for enforcement of an arbitration agreement where one party refuses to arbitrate. It requires a 'United States district court' to entertain an application to compel arbitration." (*Cronus, supra*, 35 Cal. 4th at 388, fn. omitted.)

Samsung argues that because section 201 of the FAA states that the Convention "shall be enforced in United States courts" and section 3 of the FAA uses the language "courts of the United States," the analysis in *Cronus* is inapplicable. It claims that the language of section 201 establishes that state courts enforce the provisions of the Convention to the same degree as federal courts. However, Samsung ignores that section 201 refers to the enforcement of arbitration *awards*; it does not refer to a determination of whether an arbitration clause is enforceable. Nothing in the language of section 201 suggests that California courts cannot use California law on procedure to determine whether the arbitration clause is enforceable.

enforceable as other contracts, but not more so.'" (*Cronus, supra,* 35 Cal. 4th at 384.) "Thus, the FAA does not force parties to arbitrate when they have not agreed to do so [citation] or require them to do so under any specific set of procedural rules. 'Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate [citation], so too may they specify by contract the rules under which that arbitration will be conducted.'" (*Id.* at 384-385.)

As already emphasized, parties are free to contract the terms of arbitration and in the present case the parties included a broad California choice-of law provision. Respecting the parties' choice of law is fully consistent with the purposes of the FAA. (*Cf. Volt, supra,* 489 U.S. at 479.) "[W]here the parties have chosen the governing body of law, honoring their choice is necessary to ensure uniform interpretation and enforcement of that agreement and to avoid forum shopping. This is especially true of contracts between transnational parties, where applying the parties' choice of law is the only way to ensure uniform application of arbitration clauses within the numerous countries that have signed the New York Convention." (*Motorola Credit Corp. v. Uzan* (2nd Cir. 2004) 388 F.3d 39, 51 [applied Swiss choice-of-law provision, not FAA, in context of petition to compel arbitration under Convention and Chapter II, title 9 United States Code section 206].)

Thus, we conclude policy reasons do not support refusing to enforce a choice-of law provision in an international commerce dispute. In fact, the policy considerations in such a context may be heightened to the extent it may be more important to respect the parties' choice of law in evaluating the availability of arbitration.

B. *Distrust of Foreign Arbitrators*

Hynix and Samsung contend the trial court improperly based its decision to reject arbitration on the basis that it did not trust the ability of arbitrators in South Korea. Hynix and Samsung are essentially arguing that, presuming the trial court properly applied the California rules of arbitration, it improperly exercised its discretion under section 1281.2, subdivision (c). The refusal to enforce a contractual arbitration under subdivision (c) of section 1281.2 is reviewed under an abuse of discretion standard and we only reverse if the trial court exceeded the bounds of reason. (*Mercury Ins. Group v. Superior Court* (1998) 19 Cal. 4th 332, 349.)

Section 1281.2, subdivision (c) requires that, if there is an arbitration agreement, a court must order arbitration unless "[a] party to the arbitration agreement is also a party to a pending court action . . . with a third party, arising out of the same transaction . . . and there is a possibility of conflicting rulings on a common issue of law or fact."

Hynix complains that the trial court began the hearing on July 12, 2005, by explaining its tentative decision and exhibiting a distrust of foreign arbitrators.[16] The court explained its tentative decision by stating the following, in pertinent part: "My tentative ruling is to . . . refuse to enforce the arbitration clause under . . . [section 1281.2, subdivision (c)], and the reason I say that is if the claim against Hynix went to South Korea for arbitration there is no assurance that any of the other parties can be compelled to participate in

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[16] Samsung also relies on these statements made by the trial court at the hearing on Hynix's motion to compel arbitration. The court did not make these statements at the hearing on Samsung's motion to compel arbitration.

that, that evidence from them, which I think is essential to an efficient resolution of the claims raised here, could be presented to the South Korean Court. There is conceivably a problem of a South Korean—I said Court, I meant group of arbitrators, but there's conceivably a problem of that group enforcing U.S. law or California law. I don't know what the language situation might do, I think there's a requirement that the arbitration proceed in English, that might limit who you get to have as an arbitrator there. [¶] The point is that I can't—I don't think there's a reasonable basis for believing that by proceeding with the arbitration alone in South Korea, even that case will get a full and complete and appropriate resolution and then when you combine that with the situation where what's left here might have a wholly different resolution, we could very well have inconsistent results here.

"This is not a situation where the claim against a group of defendants might be identical, but each one rest on its own facts and situation. That type of a claim might be easier to have a claim against one defendant be severed off. [¶] Here the claim is one of concerted action and concerted behavior and by parceling out one defendant and sending it for resolution to a place where the other defendants may not be able to, forced to participate or give evidence. In a literally foreign environment I think there's a high risk of inconsistent results. [¶] There is also, I think, a certain duplication of effort result there."

Hynix and Samsung point out that the United States Supreme Court has admonished courts not to "disparage the authority or competence of international forums for dispute resolution." (*Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* (1995) 515 U.S. 528, 537.) Courts should not construe domestic legislation "to nullify foreign arbitration clauses because of inconvenience to the plaintiff or insular distrust of the ability of foreign arbitrators to apply the law." (*Id.* at p. 539.) To the extent the lower court's decision was

based on a distrust of Korean arbitrators, Hynix and Samsung argue the court abused its discretion.

Additionally, Hynix contends that Samsung also moved to compel arbitration and therefore other parties have valid and enforceable arbitration agreements covering Rambus's claims against them. Thus, Hynix appears to be arguing that the court gave too much weight to the factor that not all of the parties were subject to arbitration.

Although the court's remarks regarding the Korean arbitrators could be construed to evince some mistrust of the Korean arbitrators, subsequently the court clarified that it "assumed" the Korean arbitrators would understand California law. Moreover, the court made clear it was not basing its decision to deny the motion to compel arbitration on any mistrust of the Korean arbitrators, but on its determination that the arbitration posed substantial risks of inconsistent results and of duplication of effort. This was reaffirmed in the court's statements of decision, which established that the court only considered these latter two factors when deciding to deny arbitration under section 1281.2, subdivision (c).

It is undisputed that the claims against Micron are not governed by an arbitration provision and therefore the court properly considered there could be inconsistent results and a duplication of effort. With regard to "inconsistent results," the court emphasized that this was a grave concern because the claims at issue involved "concerted action and concerted behavior" by all of the defendants. If each claim rested on its own facts, the court explained that it would have been easier to permit a defendant to arbitrate separately. Moreover, "duplication of efforts would result because the same materials might have to be dealt with twice in the two different forums."

Accordingly, we conclude that the trial court did not abuse its discretion in refusing to enforce the arbitration

clause under section 1281.2, subdivision (c), since the record supported a finding there was a possibility of conflicting rulings on common issue of fact or law if this particular dispute proceeded to arbitration.[17]

DISPOSITION

The judgment is affirmed and Rambus is awarded the costs of appeal.

/S/
Lambden, J.

We concur:

/S/
Kline, P.J.

/S/
Richman, J.

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[17] Rambus also contends that the lower court's ruling should be upheld for the independent reason that the parties' dispute is outside the scope of the arbitration clause. We need not reach this issue since we are affirming on the basis that the court properly exercised its discretion to refuse to enforce the arbitration clause under section 1281.2, subdivision (c).

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

RAMBUS INC., Plaintiff, vs. **MICRON TECHNOLOGY, INC., et. al.,** Defendants. AND RELATED CROSS-ACTION	CASE NO. 04-43115 **STATEMENT OF DECISION AND ORDER RE: HYNIX DEFENDANT'S MOTION TO COMPEL ARBITRATION** [CAL. CIV. PROC. CODE §§ 632, 1291, 1294] Date: July 12, 2005 Time: 2:30 pm Dept: 304 Judge: Hon. Richard A. Kramer Date Comp Filed: May 5, 2004

STATEMENT OF DECISION AND ORDER

RE: HYNIX DEFENDANTS' MOTION TO COMPEL ARBITRATION

The Motion to Compel Arbitration brought by Defendants Hynix Semiconductor, Inc. and Hynix Semiconductor America, Inc. (collectively the "Hynix Defendants") came regularly for hearing on July 12, 2005, before this Court in Department No. 304, the Honorable Richard A. Kramer, Presiding. Plaintiff Rambus Inc. ("Rambus") and the Hynix Defendants appeared through their respective counsel. Defendants Micron Technology, Inc. and Micron, Semiconductor Products, Inc. (collectively the "Micron Defendants") also appeared through their counsel.

The Court, having considered the papers and evidence submitted on behalf of the Parties and the oral arguments of counsel presented at the hearing, **denies** the Hynix Defendants' Motion to Compel Arbitration pursuant the California Code of Civil Procedure Section1281.2(c).

Pursuant to Sections 632, 1291, and 1294 of the California Code of Civil Procedure, the following Statement of Decision sets forth the factual and legal bases for the Court's decision:

APPLICABILITY OF THE ARBITRATION CLAUSE

1. There is a valid and enforceable arbitration clause in the Semiconductor Technology Agreement between Hynix Semiconductor, Inc. and Rambus dated December 9, 1994 ("1994 Agreement"), that covers the Cartwright Act, tortious interference and unfair competition claims against Hynix. Such claims "arise out of or in connection with" the 1994 Agreement. [23:5-7; 32:17-22][1] The 1994 Agreement created the relationship at issue and is an integral part of the

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[1] References are to the July 12, 2005 Hearing Transcript at page:line(s).

claims because it was the vehicle that allowed the alleged activities to go forward, if they did. [22:17-23:7]

2. Sections 9.1 (choice of law clause) and 9.2 (arbitration clause) of the 1994 Agreement must be read to render the California rules of arbitration applicable to interpreting the 1994 Agreement. [32:17-22]

3. Section 9.1 of the 1994 Agreement provides that, "This Agreement shall be governed by and interpreted in accordance with the laws of the State of California, U.S.A., without reference to conflict of laws principles." Section 9.2 provides, in pertinent part that, "The arbitrator shall apply California law to the merits of any dispute or claim, without reference to rules of conflicts of law or arbitration."

4. The question is whether or not the words "without reference" should be read to say "except as to." [25:27-26:16] The words in Section 9.2 stating that "without reference to rules of conflicts of law or arbitration" cannot be read to mean "except in the areas of conflicts or law or arbitration." That is not a reasonable reading of that phrase. Instead, Section 9.2 clearly states that the arbitrator is to apply California law to the merits of the claims even if a party asserts, for example, that South Korean rules of conflicts of law or arbitration would require otherwise. This is the only way to read that clause. [26:2-5; 32:22-33:4]

5. The California rules of arbitration, including Section 1281.2(c) of the California Code of Civil Procedure, apply to this case. [33:3-4] Section 1281.2(c) applies even where the party refusing to arbitrate is sophisticated and knew exactly what it was doing in entering into an arbitration agreement. [12:15-18]

APPLICABILITY OF CCP SECTION 1281.2(c) AND *CRONUS INVESTMENTS*

6. Under Section 1281.2(c) of the California Code of Civil Procedure and *Cronus Investments, Inc. v. Concierge*

Services, 35 Cal. 4th 376 (2005), the Court has the discretion to refuse to enforce an arbitration clause if the designated circumstances exist. The Court finds that those circumstances exist under subsection (c), and that to allow the arbitration to go forward would cause a substantial risk of inconsistent results and undue duplication of efforts. [33:6-10] If California rules of arbitration did not apply to this dispute, then Section 1281.2(c) would not apply and the Court would not have discretion to deny arbitration. [8:14-9:4]

7. **Inconsistent Results**. For example, this case does not involve identical claims against a group of defendants with each claim resting on its own facts. That type of claim might be easier to sever against one defendant and arbitrate separately. Here, each claim is one of concerted action and concerted behavior. By parceling out the claims against one defendant for resolution in a forum where the other defendants may be unable or unwilling to participate, there is a high risk of inconsistent results. [*See* 10:6-15]

8. **Duplication of Efforts**. By way of further example, if the Hynix arbitration were to proceed in South Korea, and the remaining claims were tried in California, duplication of efforts would result because the same materials might have to be dealt with twice in the two different forums. [*See* 10:16-19]

STATEMENT OF DECISION

9. This Order shall constitute the Statement of Decision pursuant to Section 1291 of the California Code of Civil Procedure. [33:19-24]

IT IS HEREBY ORDERED THAT:

In order to avoid duplication of effort, waste, and possible inconsistent results, the Court exercises its discretion under Section 1281.2(c) of the California Code of Civil Procedure and *Cronus Investments, Inc. v. Concierge*

Services, 35 Cal. 4th 376 (2005), and orders that the Motion to Compel Arbitration by Defendants Hynix Semiconductor, Inc. and Hynix Semiconductor America, Inc. is hereby **DENIED.**

Dated: 8/30/05

/S/ Richard S. Kramer
HONORABLE RICHARD A. KRAMER
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM:
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Hynix Semiconductor Inc. and
Hynix Semiconductor America, Inc.

PRESENTED BY:
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APPENDIX D

Code of Civil Procedure of California
Part 3. Special Proceedings of a Civil Nature
Title 9. Arbitration
Chapter 2. Enforcement of Arbitration Agreements

§ 1281.2. Order to arbitrate; Determination of other issues

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for the revocation of the agreement.

(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such

controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

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No. 06-1681

FILED
AUG 20 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

HYNIX SEMICONDUCTOR, INC. and
HYNIX SEMICONDUCTOR AMERICA, INC.,

Petitioners,

v.

RAMBUS INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Rambus Inc. has no parent corporation, and no single publicly held company owns 10% or more of its stock.

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INTRODUCTION

Despite its extensive discussion of federal arbitration policy, the Petition seeks review of a state-law contract interpretation issue decided by a California intermediate appellate court. The California Court of Appeal held, based on provisions of an arbitration agreement that it found to be unambiguous, that the parties intended to incorporate California Code of Civil Procedure § 1281.2(c), a California statute giving trial courts discretion to deal with practical problems that arise in multi-party disputes where the parties have not all agreed to the same arbitration arrangements. Applying that statute, as the parties had agreed, the Court held that Plaintiff and Respondent Rambus Inc. ("Rambus") was not required to try its state antitrust claims alleging a single antitrust conspiracy among all defendants in three separate forums.[1] In the state court, Hynix itself insisted that the sole issue was the parties' intent, a matter of state law contract interpretation. In its opening brief in the Court of Appeal, Hynix stated that "the issue on appeal is whether the trial court erred in concluding that the parties to the 1994 Agreement *intended* that the California rules of arbitration apply to the dispute. . . ." In its reply brief, Hynix put the point even more emphatically, "the road to resolution of

1. The three forums would be an arbitration for Petitioner and Defendant Hynix, a separate arbitration for Defendant Samsung, and a separate jury trial for Defendant Micron (with whom Rambus has no arbitration agreement). Throughout, "Hynix" refers to Petitioners and Defendants Hynix Semiconductor, Inc. ("HSI") and Hynix Semiconductor America, Inc. ("HSA"). "Samsung" refers to Defendants and Cross-Claimants Samsung Electronics Co., Ltd. ("SEC"); Samsung Electronics America, Inc. ("SEA") and Samsung Semiconductor, Inc. ("SSI"). "Micron" refers to Defendants and Cross-Claimants Micron Technology, Inc. and Micron Semiconductor Products, Inc.

Hynix's appeal *begins and ends with the parties' contractual intent.*"[2] That is correct, and the Petition should be denied on that basis alone.

The "Question Presented" by Hynix was not raised or decided below. Hynix states the question as "whether, in light of the [Federal Arbitration Act (FAA)], generic choice-of-law clauses incorporate state arbitration rules that limit or prevent arbitration." Pet. 8. But Hynix raised no such issue in the California Court of Appeal, arguing only that the parties did not *intend* to incorporate state law — that the appeal "begins and ends with the parties' contractual intent." Hynix now argues that this Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), precludes a state court from interpreting an arbitration agreement as the California court did here. But Hynix did not advance this argument below — indeed, it did not even mention *Mastrobuono* in its briefs.

Even if the argument Hynix now makes had been raised below, it would not warrant this Court's review of this case. Hynix claims that there is a conflict arising from a supposed "tension" between this Court's decisions in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989), and *Mastrobuono*. But the unpublished disposition below is entirely consistent with the reasoning in both of these opinions.

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2. In an effort to avoid the consequences of its prior argument, Hynix represents to this Court that the California Court of Appeal reached its conclusion that it should apply § 1281.2(c) "*not* by deciding that the parties had expressly intended to choose California procedures." Pet. 15 (emphasis added). Not so. The Court of Appeal held that "any consideration of the contract as a whole results in an interpretation that *the parties expressly intended California law to apply*." App. 13a-14a (emphasis added).

In *Volt*, as here, a California Court of Appeal found that a choice-of-law clause in an arbitration agreement incorporated the California rules of arbitration, including the statute at issue here, California Code of Civil Procedure § 1281.2(c). 489 U.S. at 472. This Court deferred to the state court's interpretation of the contract and held that § 1281.2(c) neither offended federal arbitration policy nor was preempted by the FAA. *Id.* at 474-479. Noting that "the FAA itself contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate," the Court found that § 1281.2(c) is "manifestly designed to encourage resort to the arbitral process" and "generally foster(s) the federal policy favoring arbitration." 489 U.S. at 476 & n.5. The Court emphasized that, "[w]here, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA. . . ." *Id.* at 479.

Hynix asserts that, "[p]rocedurally, this case is identical to the decision this Court reviewed in *Volt*." Pet. 21-22. That is true, but only in a sense that underscores why review is unwarranted here. In both cases, the state appellate courts decided the meaning of the contract under state law principles; here, as in *Volt*, this Court must defer to that decision. There are, however, two crucial procedural differences: (1) in *Volt*, petitioner had *raised* in state court the question whether application of § 1281.2(c) offends federal law, 489 U.S. at 472; and, (2) in *Volt*, this Court had *not yet decided* that question. Neither is true here: Hynix did not raise the question below, and the issue has already been decided by this Court in *Volt*.

The disposition below is also consistent with *Mastrobuono*. There, this Court, reviewing a decision by a lower federal court, applied the long settled principle that, when a court finds as a matter of state law contract interpretation that an agreement subject to the FAA is ambiguous, the ambiguity should be resolved in favor of arbitration. 514 U.S. at 62. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 n.9 (2002) ("In *Mastrobuono*, we reiterated that clear contractual language governs our interpretation of arbitration agreements, but because the choice-of-law provision in that case was ambiguous, we read the agreement to favor arbitration under the FAA rules.") The decision below is thus wholly consistent with both *Mastrobuono*, which addresses how federal courts should resolve an ambiguity in contracts subject to the FAA, and *Volt*, which holds that a state court's interpretation of a choice-of-law provision as incorporating California Code of Civil Procedure § 1281.2(c) must be enforced.

Finally, the supposed "conflict" asserted by Hynix arises from the fact that different federal and state courts have made different findings of contractual intent—an issue of state law—as they interpreted choice-of-law clauses in particular arbitration agreements involving potential incorporation of varying state arbitration rules (some displacing an express federal rule, others not). Even assuming a true conflict existed, it would not be a matter that needs to or can be resolved in this case, in which a state court determined the parties' intent based on contractual provisions it found to be plain and unambiguous, and where this Court has already found that the state arbitration rule in question fills a gap in federal law in a way that furthers federal policy.

For all the foregoing reasons, the Petition should be denied.

STATEMENT OF THE CASE

Rambus is a leading designer and licensor of dynamic random access memory ("DRAM") interface technology. Hynix and its co-defendants Samsung and Micron are manufacturers of DRAM and wield substantial power in the global DRAM market.

Rambus alleges that defendants combined and conspired, in violation of California law, to restrict the production of, and raise the price for, Rambus DRAM ("RDRAM") chips. The Complaint asserts the same four causes of action against each defendant: (1) conspiracy to restrict output and fix prices in violation of the Cartwright Act, Cal. Bus. & Prof. Code §§ 16720 *et seq.*; (2) conspiracy to monopolize in violation of the Cartwright Act; (3) intentional interference with prospective economic advantage; and (4) unfair competition, Cal. Bus. & Prof. Code §§ 17200 *et seq.*

The choice-of-law and arbitration provisions in Rambus's agreement with Hynix provide in full:

> SECTION 9
>
> *GOVERNING LAW; ARBITRATION*
>
> 9.1. *Governing Law.* This Agreement shall be governed by and interpreted in accordance with the laws of the State of California, U.S.A., without reference to conflict of laws principles.
>
> 9.2. *Arbitration.* All disputes and differences between [Hynix] and Rambus arising out of or in connection with this Agreement shall be settled

> amicably through negotiations. In case such dispute or difference cannot be settled by such means, it shall be finally settled by binding arbitration in English. If action is initiated by [Hynix], such arbitration shall take place in San Francisco, California under the Commercial Rules of Arbitration of the American Arbitration Association by one arbitrator appointed in accordance with said rules. If action is initiated by Rambus, such arbitration shall take place in Seoul, Korea pursuant to the U.S.-Korean Commercial Arbitration Agreement of December 1, 1974 by which each party is bound. The arbitrator shall apply California law to the merits of any dispute or claim, without reference to rules of conflicts of law or arbitration. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, the parties may apply to any court of competent jurisdiction for injunctive relief without breach of this arbitration provision.

The corresponding provisions in Rambus's agreement with Samsung are similar, although they provide for arbitration by three arbitrators (instead of one) under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (instead of the U.S.-Korean Commercial Arbitration Agreement). Thus, any arbitration with Samsung would be held in a different forum and under different rules than any arbitration with Hynix. It is undisputed that no arbitration agreement applies to Rambus's claims against Micron.

On May 23, 2005, Hynix filed its motion to compel arbitration, which the trial court denied. App. 38a. The trial

court found that there was "a valid and enforceable arbitration clause" in the Agreement that applied to all of Rambus's causes of action as against Hynix. *Ibid.* But the trial court also found that "Sections 9.1 (choice of law clause) and 9.2 (arbitration clause) of the . . . Agreement must be read to render the California rules of arbitration [including California Code of Civil Procedure § 1281.2(c)] applicable to interpreting the . . . Agreement." App. 39a. Under those state law provisions, a court has discretion in certain circumstances to require that disputes be resolved in state court rather than in arbitration in order to avoid duplicative litigation and the risk of inconsistent results. The trial court exercised its discretion under section 1281.2(c) "to refuse to enforce an arbitration clause" because the specified circumstances existed. App. 39a-40a. The trial court explained that this action was not a case in which each claim against each defendant "rest[ed] on its own facts." App. 40a. Rather, "[h]ere, each claim is one of concerted action and concerted behavior. By parceling out the claims against one defendant for resolution in a forum where the other defendants may be unable or unwilling to participate, there is a high risk of inconsistent results." *Ibid.* Additionally, the trial court found that, "if the Hynix arbitration were to proceed in South Korea, and the remaining claims were tried in California, duplication of efforts would result because the same materials might have to be dealt with twice in the two different forums." *Ibid.*

The trial court denied Samsung's subsequent petition to compel arbitration for the same reasons, emphasizing that "the risk of inconsistent results and duplication of effort [was] greater, not less" because, "[a]lthough both [the Hynix and Samsung] arbitrations would be in Korea, they would be conducted in different forums under different rules" and thus

"the same materials might have to be dealt with...three times in three different forums. . . ." 1/3/06 Order ¶¶9-10.[3]

Hynix appealed, stating that there was a single issue on appeal: "whether the trial court erred in concluding that the parties to the 1994 Agreement *intended* that the California rules of arbitration apply to the dispute over whether Rambus's claims against Hynix should be arbitrated." Hynix Opening Brief 15 (emphasis added). In its reply brief, Hynix emphasized that "the road to resolution of Hynix's appeal begins and ends with the parties' contractual intent." Hynix Reply Brief 3. The California Court of Appeal resolved this purely state law question of contract interpretation by affirming in full the trial court's orders denying arbitration. Consistent with Hynix's framing of the issue on appeal, the court "examine[d] the language of the 1994 agreements to determine whether the parties intended to apply the FAA to the exclusion of California procedural law." App. 11a. The California court held that "any consideration of the contract as a whole[] results in an interpretation that *the parties expressly intended California law* to apply and there is no provision that expressly or even implicitly states that the FAA's procedural rules of arbitration apply." App. 13a-14a (emphasis added).

The Court of Appeal adhered closely to the California Supreme Court's decision in *Cronus Investments, Inc. v. Concierge Services*, 35 Cal. 4th 376 (2005), which held that a choice-of-law provision calling for an agreement to be "construed and enforced in accordance with and governed by the laws of the State of California" "incorporates

3. Samsung appealed to the California Court of Appeal and its appeal was consolidated with Hynix's. Samsung has neither filed a Petition for a Writ of Certiorari nor joined in Hynix's Petition.

California's rules of arbitration into the contract." *Id.* at 387. Acknowledging Hynix's contention that "ambiguities must be construed in favor of applying the FAA," the state court held that it need not resolve that issue because the parties' agreement "is not ambiguous." App. 16a n.9 (emphasis added); see also *id.* 12a ("We agree with the trial court's interpretation of the plain meaning of [the choice-of-law and arbitration] provisions.") (emphasis added). The California Supreme Court denied review.

REASONS FOR DENYING THE PETITION

1. The Disposition Below Was Based on Interpretation of a Contract Under State Law.

This Court has repeatedly held that the interpretation of private arbitration agreements is generally a matter of state law, which this Court does not sit to review. *First Options v. Kaplan*, 514 U.S. 938, 944 (1995); *Volt*, 489 U.S. at 474. Even when the FAA applies and a court therefore is to give "due regard . . . to the federal policy favoring arbitration," it does so "in applying general state-law principles of contract interpretation." *Volt*, 489 U.S. at 475-476. Here, the California Court of Appeal determined the parties' intent based upon California principles of contract interpretation. App. 11a-22a. Hynix itself repeatedly argued that the only question on appeal was the contractual intent of the parties. *See* Hynix Opening Brief 15 ("The issue on appeal is whether the trial court erred in concluding that the parties to the 1994 Agreement intended that California rules of arbitration apply. . . ."); Hynix Reply 3 ("the road to resolution of Hynix's appeal begins and ends with the parties' contractual intent"). The California Supreme Court summarily denied

review without reaching the merits of any issue. *See Trope v. Katz*, 11 Cal. 4th 274, 287 n.1 (1995) ("It has long been established in California that a denial of hearing is not an expression of the Supreme Court on the merits of the cause."). The Petition should therefore be denied as not raising any federal question.

2. The Question Presented Was Not Raised Below.

The "Question Presented" stated in the Petition is "[w]hether, in light of the Federal Arbitration Act's strong federal policy favoring arbitration, a generic choice-of-law clause in a contract providing for arbitration incorporates state arbitration rules that limit or prevent arbitration." Pet. i. Hynix argues repeatedly that this question arises from a tension between *Mastrobuono* and *Volt* and a resulting conflict among decisions of nine circuits and nine state courts, involving 21 decisions. Pet. 2, 8-15. It argues in this Court that *Mastrobuono* and numerous lower court decisions relying on *Mastrobuono* hold that a "generic" choice-of-law clause may not be interpreted as incorporating state arbitration rules. *See, e.g.*, Pet. 3, 9.[4] Tellingly, however, neither this Court's decision in *Mastrobuono* nor 20 of these 21 lower court decisions were so much as mentioned in Hynix's briefs to the California Court of Appeal.[5] Consistent with that fact, nowhere did Hynix argue, as it does now, that the California court was required by *Mastrobuono* to interpret the

4. As discussed below, such an interpretation of *Mastrobuono* is in any event wrong. *See infra* pp. 23-24.

5. The one other case, *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998), was mentioned only because it, like the disposition below, turned on a determination under California law whether the language of a particular choice-of-law clause incorporated California Code of Civil Procedure § 1281.2(c). *See infra* pp. 18-19.

parties' agreement as not incorporating § 1281.2(c). Nor did the California court address any such question. The California court did acknowledge the rule applied by this Court in *Mastrobuono* — that, if an agreement is ambiguous based on state law contract principles, that ambiguity should be resolved in favor of arbitration, in furtherance of the policy behind the FAA. App. 16a n.9. The state court ruled, however, that it need not resolve this issue because the meaning of the parties' agreement was not ambiguous. App. 16a n.9.

Because the Question Presented was neither raised in nor decided by the California Court of Appeal, this Court should deny review. *See Illinois v. Gates*, 462 U.S. 213, 218 (1983) ("it is only in exceptional cases, *and then only in cases coming from the federal courts*, that [this Court] considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below") (emphasis added); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (declining jurisdiction where, although an issue was raised in the state court, it was not considered by that court).

3. The California Court of Appeal's Disposition Is Fully Supported by *Volt* and Is Consistent with *Mastrobuono*.

The California court's decision here is fully consistent with both *Volt* and *Mastrobuono*. For that additional reason, the decision does not present a suitable vehicle for addressing either any perceived tension between those two decisions or any perceived conflict among lower courts with respect to their interpretation. The decision below simply does not implicate any such tension or conflict.[6]

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6. The California Court of Appeal ordered that its opinion was not to be published in the official reports of the state. App. 2a. (Cont'd)

a. The Disposition is fully supported by *Volt*.

In *Volt*, the California Court of Appeal held that, by including a general choice-of-law clause in their arbitration agreement, the parties had incorporated the California rules of arbitration, including § 1281.2(c), into that agreement. 489 U.S. at 472. As this Court noted, the state court found that, by doing so, "the parties had agreed that arbitration would not proceed in situations which fell within the scope of [§ 1281.2(c)]." *Id.* at 475. This Court emphasized both that "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review," *id.* at 474, and that "[the FAA] confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement*.' 9 U.S.C. § 4," 489 U.S. at 474-475 (emphasis and brackets in original). The Court held that the appellant in *Volt* therefore "had no [FAA-guaranteed right to compel arbitration] in the first place, because the parties' agreement did not require arbitration to proceed in this situation." *Id.* at 475.

In *Volt*, this Court squarely rejected the argument that the California court's interpretation of the parties' agreement as incorporating § 1281.2(c) somehow offended the federal policy favoring arbitration. The Court held that "[t]here is no federal policy favoring arbitration under a certain set of

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(Cont'd)

California Rule of Court 8.1115(a) provides that, except in circumstances not relevant here, "an opinion of a California Court of Appeal . . . that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action." Thus, in any event, the decision below does not create either a risk that other California courts will follow it or a conflict with any published opinion of another court, state or federal.

procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, 489 U.S. at 476.

> Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration — rules which are manifestly designed to encourage resort to the arbitral process — simply does not offend the rule of liberal construction set forth in [*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)], nor does it offend any other policy embodied in the FAA.

Ibid. The Court further held that, even assuming the procedural provisions (§§ 3 and 4) of the FAA are applicable in state court proceedings (something this Court has never held), those provisions would not pre-empt application of § 1281.2(c) where the parties have agreed to incorporate that statute into their agreement. *Id.* at 477-479. "By permitting the courts to 'rigorously enforce' [agreements to abide by state rules of arbitration] according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA." *Id.* at 479 (citation omitted); *accord Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 688 (1996) ("[In *Volt*], [w]e held that applying the state rule would not 'undermine the goals and policies of the FAA,' because the very purpose of the Act was to 'ensur[e] that private agreements to arbitrate are enforced according to their terms.'") (citations omitted).

Volt is dispositive here. The California Court of Appeal held that, by choosing California law to govern their contract, the parties incorporated California Code of Civil Procedure

§ 1281.2(c) into their arbitration agreement and "expressly intended California law to apply." App. 11a, 12a, 13a-14a, 21a-22a. Thus, as in *Volt*, the parties agreed that arbitration would not proceed in the circumstances described in § 1281.2(c). The California court found that such circumstances exist, and Hynix therefore has no right to compel arbitration under the FAA.

The California statute, as this Court held in *Volt*, furthers the FAA's policy of encouraging parties to enter arbitration agreements. *See* 489 U.S. at 476 n.5 ("California has taken the lead in fashioning a legislative response to [the multi-party] problem, by giving courts authority to consolidate or stay arbitration proceedings . . . in order to minimize the potential for contradictory judgments.") One way to encourage parties to enter into arbitration agreements is to create rules that deal with the significant practical difficulties that arise where, for reasons extrinsic to the arbitration agreement itself, arbitration would be inefficient or risk inconsistent results. If a party considering whether to enter an arbitration agreement believes that, by doing so, it may subject itself to litigating the same claims with multiple parties in different forums, with potentially inconsistent judgments, it is less likely to enter that agreement. Private parties — especially companies doing business with many others and in many jurisdictions — cannot be certain what disputes will arise and whether all the parties involved will have agreed to arbitrate among themselves. Section 1281.2(c) represents California's effort to deal with this problem, by allowing courts to stay or bar arbitration where a party is litigating the same dispute against multiple parties, some of whom have agreed to arbitrate and some of whom have not.

Volt involved a stay of arbitration pending litigation, whereas this case involves a court's declining to order arbitration in favor of resolving all the claims in a single court proceeding, but that difference should have no bearing on the outcome here.[7] The substantive policy underlying the FAA that favors arbitration does not mandate that state courts compel parties to arbitrate *every* dispute even when doing so would risk inconsistent results and cause inefficiency. By guarding against the inefficiencies and potential confusion inhering in duplicative proceedings, which would chill parties' willingness to enter into arbitration agreements in the first place, the discretion to deny arbitration under § 1281.2(c) thus furthers the federal policy of encouraging parties to enter arbitration agreements.

b. The Disposition Is Consistent with *Mastrobuono*.

The decision below is also fully consistent with this Court's decision in *Mastrobuono*. There, as the Court itself emphasized, this Court was reviewing a decision by a lower federal court, not a state court, and was therefore free,

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7. In *Volt*, this Court did not distinguish among the various options provided a trial court in § 1281.2(c) to deal with the "special practical problems" that arise in multiparty disputes when some or all of the contracts at issue include agreements to arbitrate, finding that "the California arbitration *rules* which the parties have incorporated into their contract generally foster the federal policy favoring arbitration." 489 U.S. at 476 n. 5 (emphasis added). Indeed, as Hynix concedes, "it is unclear that the distinction [] between a re-ordering of proceedings and a more substantial interference with arbitration [such as denial], is substantively meaningful." Pet. 18; *accord Volt*, 489 U.S. at 487 (Brennan, J., dissenting) ("Applying the California procedural rule, which stays arbitration while litigation of the same issue goes forward, means simply that the parties' dispute will be litigated rather than arbitrated.").

applying state law, to construe the parties' agreement in the first instance. 514 U.S. at 60 n.4. The Court found that Shearson Lehman's standard form agreement for customers to open a securities trading account was ambiguous as to whether punitive damages would be available in arbitration, as they would be in court. *Id.* at 59-62. Only after having found the agreement ambiguous under state law did the Court apply the principles that (1) ambiguities should, under the FAA, be resolved in favor of arbitration; (2) ambiguities should be resolved against the party that drafted the contract; and (3) a document should be read to give effect to all its provisions. *Id.* at 62-64. In light of all those principles, the Court found that the agreement should be construed to allow punitive damages. *Ibid.* The Court described and distinguished its prior decision in *Volt* without in any way questioning its continued validity. *See id.* at 57-58, 60 n.4. The decision below is fully consistent with *Mastrobuono* because here, as in *Volt*, the state court held that the parties' choice-of-law and arbitration agreements plainly and unambiguously incorporated California rules of arbitration, including § 1281.2(c).

This Court has itself explained that *Mastrobuono* and *Volt* are not inconsistent but reflect different approaches depending on whether the issue arises in state or federal court, *see Mastrobuono*, 514 U.S. at 60 n.4, and whether the agreement in question is, as a matter of state law, clear or ambiguous. In *Waffle House*, the Court explained its decision in *Volt* and then stated, "Our decision in [*Mastrobuono*] is not inconsistent with this position." 534 U.S. at 294 n.9. "In *Mastrobuono*, we reiterated that clear contractual language governs our interpretation of arbitration agreements, but because the choice-of-law provision in that case was ambiguous, we read the agreement to favor arbitration under

the FAA rules." *Ibid.* Where the agreement is clear, "*Volt* and *Mastrobuono* both direct courts to respect the terms of the agreement without regard to the federal policy favoring arbitration." *Ibid.* Here, the state court held that the agreement plainly and unambiguously incorporated § 1281.2(c); under *Volt* and *Waffle House*, that agreement must be enforced. *Mastrobuono* does not suggest otherwise.

4. This Case Does Not Involve Any Conflict Among the Circuit and State Courts.

Hynix contends that "[t]he federal and state courts are in conflict over whether, in light of the FAA, generic choice-of-law clauses incorporate state arbitration rules that limit or prevent arbitration," and it claims the conflict arises from an asserted "tension" between *Volt* and *Mastrobuono*. Pet. 8. Federal and state courts *have* reached varying conclusions in interpreting choice-of-law clauses and determining whether they incorporate state rules of arbitration. But Hynix ignores both the significant difference between federal and state cases and the reasons why different courts have reached different conclusions.

The interpretation of contractual language is at bottom a matter of state law, but, where the state courts have not spoken, a federal court must decide how it should interpret a choice-of-law clause in an arbitration agreement in the first instance. *Mastrobuono* addressed that question, although the Court there resolved it only with respect to the particular facts of that case. *See Roadway Package Sys. v. Kayser*, 257 F.3d 287, 297 (3d Cir. 2001) ("The Court [in *Mastrobuono*] was careful to make clear that it was rendering no holding as to the meaning of the [choice-of-law] clause itself."). A state court decision might present this Court with two somewhat

different questions (if those questions were properly raised): (i) whether the court correctly applied the federal policy in favor of arbitration to an ambiguous choice-of-law provision; and (ii) whether the state court's interpretation of a choice-of-law clause as unambiguously incorporating state arbitration rules offends the federal policy embodied in the FAA. The first question does not arise here, because the state court found that the parties' agreement was unambiguous. The second question has already been answered, with respect to § 1281.2(c) itself, by this Court in *Volt*. 489 U.S. at 476 ("Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration . . . simply does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA.")

Hynix has also misstated the reasons for differing outcomes in the lower courts. The two principal circuit court decisions relied on by Hynix in the Petition — *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998), and *Security Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322 (2d Cir. 2004) — reveal that the purported "conflict" arose from an issue of state law that has since been resolved by the California Supreme Court. Hynix cites *Wolsey* as the prime example of a decision holding that a "generic choice-of-law provision" does not incorporate state arbitration rules and asserts that *Wolsey* "conflicts directly with the decision below." Pet. 9. But the court in *Wolsey* simply failed to anticipate correctly how the highest state court would rule. The Ninth Circuit, applying California contract law, 144 F.3d at 1209-1211, held that a choice-of-law clause that provided that the agreement "shall be interpreted and construed under the laws of the State of California" did not incorporate California's arbitration rules, including specifically

§ 1281.2(c), *id.* at 1209-1213, a ruling the California Supreme Court has since rejected, as explained below.

Hynix then cites *Security Ins. Co. of Hartford* as its lead example of a contrasting decision holding "that generic choice-of-law clauses incorporate state rules that restrict or prevent arbitration." Pet. 13. In that case, the Second Circuit, also applying California law, predicted that the California Supreme Court would rule that a choice-of-law clause providing that "[t]his Agreement shall be governed by and construed according to the laws of the state of California" does "incorporate the state's procedural rules for arbitration." 360 F.3d at 328-329. *See also id.* at 327 n.4 (declining to follow *Wolsey* because "[t]he Ninth Circuit did not predict how the California Supreme Court would rule on the question of state law").

The California Supreme Court has resolved the "conflict" between *Wolsey* and *Security Ins. Co. of Hartford* on which the Petition is premised. In *Cronus*, the court held that a choice-of-law clause providing that an agreement "shall be construed and enforced in accordance with and governed by the laws of the State of California" "incorporates California's rules of arbitration into the contract." *Cronus Investments, Inc.*, 35 Cal. 4th at 387. The California Court of Appeal here, of course, followed *Cronus*. App. 15a-22a. If and when a similar issue arises again in a federal court, that court should and presumably will follow the decision of the highest court in California.[8]

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8. Another decision cited by Hynix, *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266 (9th Cir. 2002), followed *Wolsey* before *Cronus* was decided. *Id.* at 1269-1270.

The "conflict" among the other cases cited by Hynix similarly arose from the courts' differing conclusions about the parties' contractual intent, viewed in light of the various state arbitration rules at issue. Indeed, Hynix acknowledges this in the Petition. *See* Pet. 16 (arguing that "the lower courts have simply interpreted the same basic contractual language differently"). The federal court decisions that find no incorporation of a state rule do so because they find that the parties' agreements are ambiguous — that the evidence of their intent to incorporate state law is not sufficiently clear — and that such ambiguity should be resolved in favor of a federal rule that addresses the same issue as the competing state rule. *See, e.g.*, *Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 29 (1st Cir. 2005), *cert. denied*, 547 U.S. 1071 (2006) (evidence "insufficient to indicate the parties' intent to contract for the application of state law [in place of the 'extremely limited judicial review contemplated by the FAA']"; *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 592-595 (1st Cir. 1996) (evidence not sufficiently clear that the parties intended to displace the federal rule that the NASD time bar is to be decided by the arbitrator with a state rule to the contrary); *Roadway Package Sys.*, 257 F.3d at 295 ("RPS and Kayser have expressed no clear intent as to whether the [court] should have applied federal or state [judicial review] standards"); *Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 383 (4th Cir. 1998) (no "unequivocal expression of the parties' intent to commit adjudication of timeliness defenses to the court, rather than to an arbitrator"); *Acton Indus. v. United States Fid. & Guar. Co.*, 358 F.3d 337, 343 (5th Cir. 2004) (no "clear intent to depart from the FAA's [judicial review] standard"); *Ferro Corp. v. Garrison Indus.*, 142 F.3d 926, 937 (6th Cir. 1998) ("no indication that the parties intended to incorporate Ohio law to determine that [contrary to the federal rule] the issue of fraudulent

inducement should be adjudicated in a judicial forum"); *Jacada, Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 711 (6th Cir.), *cert. denied*, 546 U.S. 1031 (2005) (evidence did not "unequivocally" show an intent to displace the federal standard of judicial review); *UHC Mgmt. Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997 (8th Cir. 1998) (holding that evidence did not show clear intent to displace express federal standard of judicial review with state standard, where choice-of-law provision provided that state law must yield "whenever preempted by federal law").[9]

State courts, speaking with authority to the state-law contract interpretation issue, have sometimes reached parallel conclusions. *See, e.g., Levine v. Advest*, 244 Conn. 732, 755, 714 A.2d 649 (1998) ("we conclude that the language of the arbitration portion of the parties' agreement creates an ambiguity . . . as to whether the parties intended the choice of law portion of the agreement to incorporate [a state law rule permitting timeliness defenses to be raised in court]"); *L & L Kempwood Assocs L.P. v. Omega Builders, Inc.*, 9 S.W.3d 125, 126-128 (Tex. 1999) (choice-of-law clause calling for "the law of the place where the Project is located" did not sufficiently evidence intent to displace federal rule that sufficiency of notice is an arbitrable issue, because "Houston . . . is subject to federal law as well as Texas law"); *Autonation Financial Services Corp. v. Arain*, 264 Ga. App.755, 756, 592 S.E.2d 96, 98 (Ga. 2003) ("the language of the arbitration clause makes clear the parties' intention that it is governed by the FAA").

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9. Several of these cases addressed the question whether parties may, by contract, require a federal court to review an arbitration agreement under a standard different from that provided expressly by the FAA (*see* 9 U.S.C. §§ 10, 11), a question as to which this Court recently granted a writ of certiorari. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, No. 06-989.

The cases relied upon by Hynix in fact confirm the very legal principles that underlie *Volt*, *Mastrobuono*, and the disposition below: (1) the parties to an arbitration agreement may, consistent with federal law, agree that state rather than federal arbitration rules will govern their dispute, *e.g.*, *Wolsey*, 144 F.3d at 1209 ("parties are free to enter into contracts providing for arbitration under rules established by state law rather than under rules established by the FAA"); *Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d at 31 ("We agree with the other circuits that have concluded that the parties can by contract displace the FAA standard of review. . . ."); *Roadway Package System, Inc. v. Kayser*, 257 F.3d at 288 ("the FAA permits parties to contract for vacatur standards other than the ones provided in the FAA"); (2) whether the parties have incorporated state arbitration rules into their agreement depends upon a finding with respect to the parties' intent, *e.g.*, *PaineWebber Inc. v. Elahi*, 87 F.3d at 593 ("the question is whether the parties *intended*, through their general choice of New York law, to adopt for themselves the New York caselaw requiring that courts, not arbitrators, decide the time bar") (emphasis in original); *Ferro Corp. v. Garrison Industries, Inc.*, 142 F.3d at 931 ("the issue of fraudulent inducement of the entire contract is an issue to be resolved by the arbitration process, in the absence of evidence that the contracting parties intended to withhold the issue from arbitration"); *Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d at 710 ("we must interpret the parties' contract and then decide, as a matter of law, whether the choice-of-law provision in that contract is intended to apply Michigan's standard of review for arbitral awards"); and (3) the question of intent is one of state contract law, consistent with this Court's deference to the decision of the California court in *Volt* with respect to the question of the

parties' intent, *see, e.g.*, *Wolsey*, 144 F.3d at 1212 (distinguishing *Volt* because "the *Volt* Court [] declined to review a state court's interpretation of a private contract"); *Puerto Rico Tel. Co.*, 427 F.3d at 28 (this Court "deferr[ed] to the state court's intepretation of the contract"); *PaineWebber Inc. v. Elahi*, 87 F.3d at 594 n.5 (distinguishing *Volt* because this Court "deferred to the California court's finding under state contract law").

Here, the California Court of Appeal found, as a matter of state law contract interpretation, that the plain and unambiguous intent of the parties was to incorporate California arbitration rules, including Code of Civil Procedure § 1281.2(c). As this Court emphasized in *Volt*, the FAA contains no provision comparable to § 1281.2(c) that is "designed to deal with the special practical problems that arise in multiparty disputes when some or all of the contracts at issue include agreements to arbitrate." 489 U.S. at 476 n.5. Thus, in this case — in contrast to those relied upon by Hynix — the court below found that the parties' intended to incorporate a state rule that, rather than displacing an express federal rule, fills a gap in federal law in a way that "generally foster(s) the federal policy favoring arbitration." *Ibid.*

To the extent that one or more of the circuit court opinions imply that *Mastrobuono* adopted or supports the adoption of a *federal* common law rule of contract interpretation, under which a generic choice-of-law clause may never — regardless of the context and the type of state rule involved, and regardless of otherwise controlling state law principles — support a finding that the contracting parties intended to incorporate a state arbitration rule, *see, e.g.*, *Roadway Package System*, 257 F.3d at 297, that is both wrong

and inconsistent with the principles that (i) the issue of contractual intent is a matter of state law and (ii) federal arbitration law requires only that the intent of the parties be enforced. As noted above, in *Mastrobuono*, this Court, applying state law rules of contract interpretation, determined the particular choice-of-law clause before it to be ambiguous, in light of other express provisions of the contract, and then harmonized the provisions, construing them against the drafter and in favor of arbitration. 514 U.S. at 58-64. Those courts that suggest that a strict federal rule arises from *Mastrobuono* have simply misread the decision and skipped over the necessary step of deciding whether, under state law, a choice-of-law clause is ambiguous. In any event, both because this case arose in state court and because such an argument based on *Mastrobuono* was not raised below by Hynix, this case is not an appropriate vehicle to address the question.

CONCLUSION

In sum, the Petition presents no question worthy of review by this Court. The Petition should be denied.

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No. 06-1681

IN THE

Supreme Court of the United States

HYNIX SEMICONDUCTOR, INC. AND HYNIX SEMICONDUCTOR AMERICA, INC.,

Petitioners,

v.

RAMBUS INC.,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

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REPLY BRIEF FOR PETITIONERS

One of the central purposes of the Federal Arbitration Act ("FAA") is to ensure that arbitration agreements are uniformly enforced regardless of the forum in which enforcement is sought. *See Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995). As a direct result of the broad division of authority described in the Petition, however, materially identical arbitration and choice-of-law provisions are being subjected to radically different interpretations depending on where they are litigated. In the decision below, for example, the California Court of Appeal interpreted a generic California choice-of-law clause to require application of California procedures, and then used those procedures to refuse to enforce a binding arbitration clause that unequivocally provided that "[a]ll" disputes under the contract were to be arbitrated. App. 5a. If the same provisions had been litigated in numerous other jurisdictions around the country, there is little doubt that the court would have reached the opposite conclusion and enforced the agreement to arbitrate. *See* Pet. 8-12. Indeed, this would have been the likely result if Respondent had brought its lawsuit in *federal* rather than state court in California. *See* Pet. 5, 9-10; note 1 *infra*.

This division of authority and the uncertainty it creates affect *every* contract that includes both an arbitration clause and a generic choice-of-law clause—which is to say, most contracts involving international commerce, and many domestic contracts as well. In its Opposition, Respondent never disputes the importance of the question presented. Instead, it argues that this Court should not and cannot address this important issue.

Respondent is wrong. First, despite Respondent's assertions, there is no serious dispute that this conflict of authority exists. *See, e.g., Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001); *Security Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 323 (2d Cir. 2004). Respondent

suggests that the conflicting decisions in the state and federal circuit courts can be reconciled based on differences in the contractual and state law provisions at issue. But as the Petition itself demonstrated, the cases cannot be so reconciled, because the provisions at issue are in all relevant respects identical.

Unable to credibly deny this conflict of authority, Respondent falls back on arguments challenging the presence of a properly-raised federal question in this case. But these arguments too lack merit: interpretation of arbitration agreements under state contract law can implicate the FAA directly, and this Court routinely reviews the decisions of state courts applying state law for conformity with that federal law. And as the Court of Appeal expressly noted, the applicability of the FAA—including the FAA's pro-arbitration interpretive presumption—was raised in the proceedings below. Respondent also argues that the decision below is consistent with both *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989), and *Mastrobuono v. Shearson Leahman Hutton, Inc.*, 514 U.S. 52 (1995). However, that is at root a merits argument that is irrelevant to whether this Court should grant review. It is also incorrect. Certiorari should be granted.

ARGUMENT

A. There Is An Entrenched Conflict Of Authority Over Whether A Generic Choice-of-Law Clause Incorporates State Rules That Limit Or Prevent Arbitration

As the Petition explains, the federal circuit and state courts are directly and broadly divided over the FAA's effect on generic choice-of-law clauses that select the law of states whose rules limit or prevent arbitration. *See* Pet. 8-16. Seven circuits and at least five states have held that, in light of the FAA's pro-arbitration policies, such clauses determine only the substantive law that governs interpretation of the

contracts in which they appear. *See* Pet. 8-12. Two circuits and courts in four states, in contrast, have held that such clauses also incorporate state arbitration rules, even where those rules limit or prevent arbitration. *See* Pet. 12-16.

Nothing in Respondent's brief diminishes the breadth or seriousness of this split of authority. Respondent concedes, as it must, that "[f]ederal and state courts have reached varying conclusions in interpreting choice-of-law clauses and determining whether they incorporate state rules of arbitration." Opp. 17 (emphasis removed). Unable to deny the existence of a conflict, Respondent argues that these divergent outcomes can be explained by "the courts' differing conclusions about the parties' contractual intent, viewed in light of the various state arbitration rules at issue." Opp. 20.

But the Petition itself refutes this argument: as is explained there, the question presented in this case *only* arises when the parties to a contract have *not* made a specific choice about the rules they want to govern arbitration, but rather have simply designated a given state's law to apply to the contract generally. *See* Pet. 15-16. The Petition concretely demonstrates that the generic choice-of-law clauses at issue in these cases are materially identical, *see* Pet. 16 n.1, and that no specific intent regarding arbitration procedures can be determined by parsing their words. The cases therefore cannot be distinguished based on differences in the parties' expressed intent. Nor can the cases be reconciled based on differences in state arbitration law: while the specific state rules at issue in the cases are different, they *all* involve procedures that limit or block arbitration or the applicability of the FAA, thereby implicating the FAA's pro-arbitration policies.

The cases on either side of the split of authority thus address and resolve differently a *common* question: whether, in light of the FAA, a generic choice-of-law clause incorporates state laws that, whatever their specific provisions, hinder or block arbitration. Tellingly, while Respondent implies that

the conflicting cases can be reconciled based on different "context[s]," "type[s] of state rule[s]," and "controlling state law principles," Opp. 23, it makes *no* effort actually to show how the cases can be distinguished or the division of authority resolved in this manner. And for good reason: the cases cannot be distinguished, and the split is real. These courts fundamentally disagree about the effect of the FAA on materially identical choice-of-law provisions in situations where state law would limit or block arbitration.[1]

B. This Case Presents An Ideal Vehicle For Resolving This Conflict Of Authority

The opinion below represents an exceptionally good vehicle for resolving this conflict. The Court of Appeal's decision squarely raises the question presented in this case, clearly holding, in line with other courts on its side of the conflict, that a generic choice-of-law clause *does* incorporate state procedures that hinder or prevent arbitration. The Court of Appeal's decision, moreover, implicates the FAA's pro-arbitration policies particularly sharply, because in applying those state procedures, it did not simply delay or narrow the scope of arbitration, but rather refused to enforce the parties' arbitration agreement altogether. Further, there is no

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[1] Contrary to Respondent's assertion, the Petition is not "premised" on a conflict over California law. *See* Opp. 18-19. While the Ninth Circuit in *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998), and the Second Circuit in *Hartford* did reach conflicting decisions about whether a generic California choice-of-law clause incorporates Section 1281.2, those decisions are merely instances of the broader conflict—involving at least 18 different jurisdictions—described in the Petition. Moreover, it is not at all clear that the California Supreme Court "resolved the 'conflict' between *Wolsey* and *Security Ins. Co.*," Opp. 19, as the court in *Wolsey* reached its decision based on application of the *federal* interpretive principles set forth in *Mastrobuono*. *Cf. Hartford*, 360 F.3d at 327 n.4 (In *Wolsey*, "the Ninth Circuit relied on its interpretation of *Mastrobuono* to conclude that the choice-of-law provisions did not incorporate section 1281.2(c)(4)," rather than "predict[ing] how the California Supreme Court would rule on the question of state law.").

serious dispute that the parties to the contract in this case expressed *no* specific intent regarding the procedures that were to apply to arbitration, but rather simply included a generic California choice-of-law clause in their contract. *See* App. 13a ("The [arbitration] clause remains silent about the procedural rules that the court should apply in determining the availability of arbitration.").[2] This case thus cleanly presents the question whether, consistent with the FAA, a generic choice-of-law clause can incorporate state law that blocks enforcement of a binding arbitration agreement.

1. Respondent argues that the decision below is not suitable for review by this Court because, as an "interpretation of a contract under state law," it presents no federal question. Opp. 9-10. That is plainly wrong: as Respondent itself recognizes later in its brief, a state court decision under state law does raise a federal question when, as here, it implicates the FAA's pro-arbitration policies. *See* Opp. 17-18. Indeed, in *Volt* itself, this Court reviewed a state court deci-

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[2] Respondent repeatedly insists that the Court of Appeal found that "the parties *intended* to incorporate California Code of Civil Procedure § 1281.2(c)." Opp. 1 (emphasis added); *see* Opp. 2 n.2, 8, 14, 23. That misreads the opinion. The Court of Appeal did conclude, as Respondent notes, that "any consideration of the contract as a whole, results in an interpretation that the parties expressly intended California law to apply and there is no provision that expressly or even implicitly states that the FAA's procedural rules of arbitration apply." App. 13a-14a. But that sentence simply highlights the obvious fact that the parties included an express California choice-of-law clause in their contract, providing that California law would apply *generally* to the contract. As noted, the Court of Appeal recognized that the contract was "silent" about what arbitration procedures were to apply. Thus, the Court of Appeal was left to apply the interpretive presumption set forth by the California Supreme Court in *Cronus Investments, Inc. v. Concierge Services*, 107 P.3d 217 (Cal. 2005), which (in the Court of Appeal's view) requires application of the California rules of arbitration absent an "express[] designat[ion] that the FAA procedural rules should govern the enforcement of the arbitration clause." App. 11a; *see also* App. 15a-16a; 21a-22a; 26a; 28a (reiterating *Cronus* presumption).

sion applying state law and finding that a generic choice-of-law provision incorporated California arbitration procedures. As Respondent concedes, this case and *Volt* are procedurally identical. *See* Opp. 3. And in *Volt*, there was no question that this Court could review the state court's application of state contract law for consistency with the FAA. *See Volt*, 489 U.S. at 474-79. This Court similarly reviewed a state court's application of state arbitration law in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

Here, the Court of Appeal held that, under the California Supreme Court's decision in *Cronus*, a generic California choice-of-law clause presumptively requires application of California arbitration rules absent an *express* selection of the FAA's procedural rules. That decision squarely raises the federal question identified by Petitioner: whether the Court of Appeal's application of this state law presumption conflicts with the pro-arbitration policies of the FAA, as expressed in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), and *Mastrobuono*.

Implicitly conceding the existence of a federal question, Respondent falls back on a merits argument, asserting that the question presented does not warrant review because the Court already decided in *Volt* that interpreting a generic choice-of-law clause to incorporate Section 1281.2(c) "does not offend the rule of liberal construction set forth in *Moses H. Cone*." Opp. 18 (quoting *Volt*, 489 U.S. at 476). Not so. *Volt*'s holding does not apply here because, unlike in *Volt*, the Court of Appeal refused to enforce the arbitration agreement under Section 1281.2(c)(1), rather than merely staying it under Section 1281.2(c)(4). *See* App. 43a; *cf. Doctor's Associates*, 517 U.S. at 688 ("The state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself."). Thus, contrary to Respondent's claim, *Volt* did not answer the specific question presented by this case.

Moreover—and more fundamentally—it is precisely the scope and continuing viability of *Volt* that is at issue in this case. *See* Pet. 4, 21. As discussed in the Petition, *Mastrobuono* appeared to cast doubt on *Volt*, suggesting that it is simply inconsistent with the FAA to interpret a generic choice-of-law clause as requiring application of state rules that thwart or limit arbitration. And in the wake of *Mastrobuono*, state and federal courts have struggled to reconcile the two cases, reaching the divergent outcomes described in the Petition. *Cf.* Opp. 23-24 (recognizing that some courts have read *Mastrobuono* to adopt a federal rule providing that generic choice-of-law clauses are insufficient to incorporate state rules limiting arbitration). Thus, even if *Volt* at one time answered the question presented in this case, that answer is now in doubt, and is the subject of an entrenched split of authority. It is therefore manifestly appropriate for this Court to revisit that question and resolve this confusion.

2. Respondent also argues that the question presented was not raised below. This argument is squarely refuted by the California Court of Appeal's opinion itself, which expressly notes that Petitioner argued that "ambiguities must be construed in favor of applying the FAA." App. 16a n.9. That alone is sufficient to rebut Respondent's claim.

Respondent further suggests, incorrectly, that Petitioner's briefing in this case was restricted to the question of the parties' intent under state law. *See* Opp. 8-10. In fact, while Petitioner did argue emphatically that a correct interpretation of the contract would have recognized that the parties specified that California procedures would *not* apply, its briefing was not limited to that issue. Petitioner's opening brief included an entire section arguing that the FAA "required the trial court to compel arbitration." Hynix Opening Br. at 32. Quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), Petitioner noted that "[t]he FAA 'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to ar-

bitrate[,]' . . . a concern which 'requires that we rigorously enforce agreements to arbitrate.'"[3] Hynix Opening Br. at 33 (quoting *Mitsubishi*, 473 U.S. at 625-26). Petitioner also noted that "[t]his law is equally applicable in state as well as federal courts." *Id.* (quoting *Southland*, 465 U.S. at 12).

In its reply brief, Petitioner included a section arguing that "any ambiguities" in the arbitration agreement had to be "construed in favor of arbitration." Hynix Reply Br. at 14. This section expressly noted that there was a "presumption in federal and California law" that "uniformly favors sending disputes to arbitration," and cited (among other cases) *Moses Cone*, noting that that case had held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Hynix Reply Br. at 15 (quoting *Moses Cone*, 460 U.S. 1, 24-25 (1983)). Accordingly, the Court of Appeal was well aware of the applicability of the FAA to the contract, and of the FAA's requirement that court interpret arbitration agreements in favor of arbitration.[4]

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[3] Thus, contrary to Respondent's claims, the FAA does not contain exceptions to enforcement if arbitration would be "inefficien[t] or "risk inconsistent results." Opp. 15. Rather, as Petitioner explained to the Court of Appeal, the FAA requires that an arbitration agreement be enforced regardless of whether there are multiple parties involved, some of whom are not bound to arbitrate. *See* Hynix Opening Br. at 33-34 (citing *Moses Cone*, 460 U.S. at 19-20 ("federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement")).

[4] Contrary to Respondent's claims, the fact that the Court of Appeal's decision was unpublished does not counsel against review. *See* Opp. 2, 11 n.6. This Court routinely grants review of unpublished dispositions. As noted in the Petition, *Volt* involved review of an unpublished disposition from the California Court of Appeal. *See* Pet. 22. Many recent grants of certiorari similarly involve review of unpublished state court dispositions. *See, e.g.*, *People v. Cunningham*, No. A103501, 2005 WL 880983 (Cal. Ct. App. Apr. 18, 2005) *cert. granted, Cunningham v. California*, 546 U.S. 1169 (Feb. 21, 2006) (No. 05-6551); *People v. Sampson*, No. A102394, 2004 WL 2307111 (Cal. Ct. App. Oct. 14, 2004) *cert. granted, Samson v. California*, 545 U.S. 1165 (Sep. 27, 2005) (No. 04-9728); *People v. Hudson*, No. 246403, 2004 WL 1366947

3. Finally, Respondent argues that the decision below is consistent with both *Volt* and *Mastrobuono*, and therefore does not implicate the tension between these cases. Opp. 11-17. This is essentially a merits argument. It will doubtless be briefed and argued if this Court grants certiorari; but the fact that Respondent (predictably) believes that the decision below is correct and consistent with this Court's precedent is hardly a reason to deny review.

In any event, this argument is incorrect. The Court of Appeal's analysis clearly conflicts with the analysis in *Mastrobuono*. In that case, this Court recognized that a generic choice-of-law clause can reasonably be read as "merely a substitute for the conflict-of-law analysis" that would otherwise determine the governing substantive law, and thus that, "[a]t most," such a clause creates an "ambiguity" regarding the applicability of state rules limiting arbitration. *Mastrobuono*, 514 U.S. at 59. Under the "federal policy favoring arbitration," the Court held that this ambiguity had to be resolved in favor of arbitration. *Id.* Applying this logic here would plainly lead to the conclusion that the generic California choice-of-law clause at best introduced an ambiguity regarding whether California arbitration procedures would apply, and therefore that the FAA applies.

Respondent nevertheless argues that the Court of Appeal's decision is consistent with *Mastrobuono* because *Volt*, rather than *Mastrobuono*, controls decisions arising in state courts. Opp. 16. In this case, Respondent continues, the Court of Appeal decided that the parties' agreement was unambiguous; under *Volt*, it must therefore be enforced. Opp. 16-17. Initially, the assertion that "different approaches" apply "depending on whether the issue arises in state or federal court," Opp. 16, appears to conflict with this Court's recognition that the FAA was enacted in part to ensure uni-

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(Mich. Ct. App. Jun. 17, 2004) *cert. granted, Hudson v. Michigan*, 545 U.S. 1138 (Jun. 27, 2005) (No. 04-1360).

form enforcement of arbitration agreements in federal *and* state court alike. *See Southland*, 465 U.S. at 15; *Allied-Bruce*, 513 U.S. at 265. Further, holding that a state court's determination of the parties' intent is *immune* from review by this Court would allow parties' federal rights to be compromised by manipulation of state law, *see Volt*, 489 U.S. at 484 (Brennan, J., dissenting)—and in the end, Respondent itself recognizes that a federal court can review even a state court's holding that a contract is *un*ambiguous, *see* Opp. 18; *cf. Volt*, 489 U.S. at 475-76 (reviewing a state court determination for consistency with the FAA's pro-arbitration interpretive principle).

But in any event, the Court of Appeal's opinion in this case does *not* in fact fall clearly on the *Volt* side of the line this Court has drawn between *Mastrobuono* and *Volt*. In attempting to reconcile the two cases, this Court has suggested that *Volt* can be limited to situations where a state court has interpreted the contract at issue under state law; and where the state rule at issue re-orders the proceedings, rather than altering the enforceability of an arbitration agreement. Here, however, although the Court of Appeal did interpret the contract, it did *not*—as discussed above—find that the parties had expressly chosen California arbitration rules, but rather reached that conclusion by concluding that they had *not* expressly chosen the FAA, and then applying a default presumption based on *Cronus*. *See supra* note 2. There was thus no specific state court determination of contractual *intent* with respect to arbitration procedures. And even more clearly, the state rules at issue here resulted in a failure to enforce an arbitration agreement, not merely a re-ordering of proceedings. Thus, this case falls outside the distinctions this Court has drawn between *Volt* and *Mastrobuono*, and therefore raises particular sharply the question of how, if it all, the two cases can be reconciled.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 5, 2007